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Article

CRIME VICTIM COMPENSATION IN A POST-9/11 WORLD

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In this Article, Professor Goldscheid explores the barriers to economic independence faced by victims of domestic and sexual violence by comparing the government programs for those victims with the federal September 11th Victim Compensation Fund of 2001 created for victims of the September 11 terror attacks, another group of victims systematically impacted by violence. Professor Goldscheid chronicles and compares the history, rationales and underlying theories that animate the programs. She argues that the programs contain different, but opposite, flaws. Neither is driven by a coherent theoretical foundation or a methodical analysis of victims' economic realities in the aftermath of the violence. She concludes that the tremendous differences in program approach are not warranted by the differences in program purpose or victims' experience.

Professor Goldscheid argues that future compensation programs for victims of domestic and sexual violence should maximize cost spreading and should redress the systemic unavailability of traditional systems of recovery. She proposes an approach that is grounded in empirical data describing the reality of victims' experiences and that eliminates vestiges of bias against victims of domestic and sexual violence. The approach would generally retain the modest award structure of the state programs, but would integrate the September 11th Victim Compensation Fund's overall approach to victims, marked by meaningful efforts to address their resulting unmet practical needs, by extensive public education and outreach and by efforts to encourage participation and maximize program utilization. She cautions against the dangers of developing a two-tiered track of crime victim compensation programs—one for victims of terrorism and one for victims of other acts of violence—and identifies risks that such a dual system would present.

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*168 I. Introduction

The September 11 terror attacks transformed our social, legal, philanthropic, and political systems in ways that we can only begin to predict. For the victims--those who lost family members, homes, or jobs--the programs established to distribute benefits and resources were key to their recovery. The philanthropic response was widely recognized as unparalleled, and the public demanded coordinated, comprehensive, and accessible services for the victims.¹ While the attacks were unprecedented for the United States, the victim assistance programs that developed in response paralleled longstanding programs for victims of other violent crimes.² Nevertheless, they far outstripped them in scope and government-funded resources. The difference between the resources directed to victims of the terror attacks and those directed to victims of other violent crimes raises challenging questions about the salience of distinctions between terrorism and other violent crimes, and about the appropriate role of government compensation in helping victims of violence recover.

*169 The contrast highlights the vast discrepancy between the government-supported compensation program created for the September 11 victims and those available for victims of domestic and sexual violence, another large group of victims who are systematically affected by violent crime and who suffer stark economic consequences as a result. Domestic and sexual violence has been described as “epidemic” both in the United States and throughout the world.³ Every year, over a thousand women are killed in the United States as a result of domestic violence, accounting for approximately ten percent of all murders nationwide.⁴ Nearly a quarter of all women surveyed in government studies report having been raped or physically assaulted by a current or former intimate partner at some point in their lifetimes.⁵ Similarly, in a given year, between 40,000 and 60,000 women are sexually assaulted.⁶ A developing body of empirical data documents the economic toll exacted by domestic and sexual violence, and describes the many ways in which the violence undermines victims' economic security.⁷ Yet victims face limited options through which they can recover for their losses, as the tort system may prove *170 unavailing and restitution efforts frequently fall short of providing meaningful recovery.⁸

To help advance the question of what role government programs should play in compensating victims of violence, this Article will compare the government-supported compensation programs available to victims of domestic and sexual violence with the September 11th Victim Compensation Fund of 2001 (9/11 Fund⁹), established by Congress to assist the victims of the September 11 terror attacks.¹⁰ The 9/11 Fund was enacted as part of the Air Transportation Safety and System Stabilization Act (ATSSSA), which, among other things, sought to limit the airline industry's liability in the aftermath of the attacks.¹¹ The 9/11 Fund authorized those who lost family members in the attacks and those physically injured as a result of the attacks, to recover the cost of their losses.¹² Victim compensation through the *171 9/11 Fund is premised on the victim's waiver of her rights to sue the airlines or other related potential tortfeasors.¹³ Thus, the 9/11 Fund is ostensibly structured as an alternative to the tort system, and awards are designed to approach what one might recover through a tort action.¹⁴ However, the entire cost of the program is footed by federal tax dollars, rather than by any actual or alleged wrongdoer.¹⁵ Financial need plays a role only insofar as it drives the amount of recovery; it is not considered in eligibility determinations.¹⁶ The program seeks to maximize participation and has dedicated substantial resources to providing comprehensive assistance to each claimant.¹⁷ The average 9/11 Fund award to family members was \$2 million,¹⁸ and awards to those injured ranged from \$500 to over \$8.6 million.¹⁹ The approach has been described as “extraordinarily generous[,]”²⁰ notwithstanding potential claimants' allegations that the program is not generous enough.²¹

Victims of domestic and sexual violence, as well as victims of other violent crimes, face a very different set of options.²² Every state *172 operates a victim compensation program that provides short-term emergency assistance to victims of violent

crime.²³ These programs developed in the United States in the 1960s as an outgrowth of the criminal justice system and out of a concern that the victim was being unduly ignored in the face of new public commitment of substantial funds to fight crime.²⁴ Rather than seeking to approximate the amount of compensation a victim might recover in tort, these programs provide modest financial assistance.²⁵ The programs draw on public funding streams that are financed nearly exclusively by defendant fines and fees.²⁶ In this way, the term “state” victim compensation programs is a misnomer, because, unlike the 9/11 Fund, virtually no government funds are expended to support them.²⁷ In some states, claimants must establish financial need and will not be eligible if their income and resources exceed designated amounts.²⁸ Awards are capped at amounts averaging \$35,000; the average award to victims has remained between \$2000 and \$2500 for many years.²⁹ Minimal funding is available for program administration and public education.³⁰

Of course, differences between the programs readily can be dismissed as reflective of the myriad ways in which the terror attacks were unprecedented in scope and effect. Perhaps even more important is the practical distinction that the 9/11 Fund substitutes for a tort lawsuit and requires claimants to waive virtually all claims to tort recovery.³¹ But on closer inspection, the respective programs are ***173** worthy of examination and comparison.³² Victims of terrorism and victims of domestic violence and sexual assault share much in terms of the trauma experienced and the resulting financial and practical needs that often are not covered by other reimbursement sources.³³ These needs include financial assistance, reimbursement for the costs of shelter and transportation, medical bills, lost wages and funeral expenses, and counseling to help with shock, grief, loss, and the other complex emotions associated with violent crimes.³⁴ For example, both those who lost family members in the terror attacks and those who lose family members to domestic or sexual violence may require financial assistance to help replace wages of the deceased on which they were dependent, counseling to help cope with their loss, and practical assistance in negotiating a range of needs such as relocation, new childcare arrangements, and financial planning.³⁵ A careful analysis of the circumstances victims face demonstrates that systemic factors prevent both groups from recovering damages through traditional mechanisms.³⁶ In some senses, a stronger case can be made for government compensation for victims of domestic and sexual violence given the historic biases that have prevented those individuals from obtaining redress through the civil or criminal justice systems.³⁷ In addition, empirical data demonstrates the stark economic challenges victims of domestic and sexual violence face, which may prevent them from seeking, or obtaining, safety.³⁸ Nevertheless, those two groups face a dramatically different range of services and benefits depending on which crime gave rise to their losses.

This Article analyzes both programs in light of their history, the arguments invoked to support them, and the underlying goals that may justify compensation programs for victims of violent crime. It argues that the programs contain different, but opposite, flaws, and that the ***174** tremendous differences in programmatic approach are not justified by the differences in program purpose or client experience. The 9/11 Fund's structure as a substitute for the tort system, in which government pays for tort-like awards with no structural incentives to promote deterrence by the actors who may otherwise have faced liability, is difficult to justify as a model for future programs. However, its program directive that victims' needs be taken seriously correctly respects the difficulties victims of violence face, and makes serious efforts to address their needs. By contrast, the state victim compensation programs reflect an innovative approach to compensation that holds the potential of substantially advancing victims' resulting financial needs without imposing a huge tax on the public. However, the virtually complete lack of governmental support and attendant restrictive program requirements hamper the programs' ability to fully realize those goals.

Victim compensation is ancillary in both cases: to airline industry financial security, in the case of the 9/11 Fund, and to the criminal justice system, in the case of the state compensation programs. Neither is driven by a coherent theoretical foundation or a careful analysis of victims' actual needs for compensation based on the economic concerns and realities associated with the violence. The state compensation programs go a long way toward maximizing cost-spreading and meeting crime victims' resulting needs, but they retain unduly restrictive features that reflect both the minimal resources authorized for the programs and historic biases about victims. By contrast, the 9/11 Fund, developed in the absence of historic bias, was driven by an

overwhelming public perception that victims were “innocent” and “deserving” of comprehensive assistance and support. In that context, it defined a new standard for what it means to meet crime victims' needs.

This Article argues in support of what could be considered a “victim-centered” or “restorative” approach to future compensation programs. A victim-centered program would retain the modest award structure of the state programs, but would integrate the 9/11 Fund's general approach to victims, marked by sufficient resources to enable the program more fully to address victims' resulting unmet practical needs, to conduct extensive public education and outreach, and to undertake substantial efforts to encourage participation and maximize program utilization. It would be grounded in empirical data about the challenges victims experience as a result of the violence, and the economic and structural limitations that often hamper their ability to ***175** recover from the violence absent external supports. This Article argues that an approach that both maximizes cost-spreading and meaningfully addresses crime victims' resulting financial needs would best advance victims' interests. Such an approach could be realized within a fiscal framework that is reasonable for a government-supported program. Extending the 9/11 Fund's compensation structure to victims of future acts of terrorism risks the creation of a two-tiered approach to compensation that is not warranted by the differences in the impact of the violence on the respective victims' lives.³⁹ However, extending its fundamental programmatic approach to victims who have survived trauma from criminal violence other than terror attacks could mark a substantial positive reform.

This Article lays the foundation for the analytic comparison by describing the two programs before comparing their approaches, goals, and implications for the future. Part II describes the state victim compensation programs, recapping their evolution as part of the “War on Crime” and the victims' rights movements that took root in the 1960s. Numerous rationales were propounded to support public funding during the debate that preceded the programs' enactments. However, the programs ultimately avoided the question of how to justify public support through a funding structure that leveraged defendant fines and fees and virtually eliminated public funding. While this structure undoubtedly facilitated the programs' enactments, it also produced a modestly resourced program that limited, rather than encouraged, program participation. The resulting system functioned as ***176** an offshoot of the criminal justice system, rather than one focused on crime victims' experiences and needs.

Part III addresses the 9/11 Fund, reviewing its legislative history, program structure and the benefits available for victims. The program's provision of tort-based awards was driven by its essential function as part of a financial assistance package for the airline industry. However, from a compensation perspective, providing awards approximating tort damages without any accountability by wrongdoers fails to advance the deterrence goals central to the tort system. On the other hand, its many programmatic initiatives that take victim needs seriously merit further consideration. By going to lengths to encourage participation and meet the victims on their own terms, the program offers an approach to service that resource-strapped victim compensation programs cannot provide.

Part IV evaluates and compares the programs. It starts by comparing the experiences of the victims--analyzing the similarities of need and the differences in context, and refutes the arguments that would dismiss the analogy outright. It concludes that there are sufficient similarities to warrant the comparison. Part IV then analyzes the primary rationales propounded in support of both programs. It examines the use of compensation programs as a substitute for tort actions, as a social welfare program, as a mechanism through which the risks and costs of crime are spread, and as an initiative that enhances the effectiveness of the criminal justice system. It assesses the ways in which these rationales and approaches comport with several of the goals that can be understood to underlie compensation systems: corrective justice, distributive justice, and deterrence. Both programs' limitations reflect the fact that each evolved as part of systems with primary goals other than providing appropriate compensation to victims, and are not based in a theory that makes the economic impact of violence on victims' lives central.

When these realities are considered, the “tort substitute” and “cost-spreading” approaches emerge as the most promising rationales for future initiatives. Crime victim compensation programs may be best conceived as providing a means for recovery in cases in which the tort system will be systematically unavailable. They will best serve victims' interest in compensation and society's interest in minimizing costs if they maximize cost-spreading, which the state programs accomplish through use of

defendants' fines and fees. These fees will not be sufficient, however, to meet victims' needs, and should not be the sole source of programmatic support.

*177 Part V identifies two issues that emerge from this analysis that should be taken into account in the future. First, empirical data about victims' access to and ongoing unmet needs for compensation supports expanding the state programs' eligibility criteria, and enhancing public education and outreach. This empirical data, grounded in victim experience, should provide a foundation for program development. Second, the disparate approaches represented by the two programs accentuate historic and enduring bias against victims of domestic and sexual violence. This bias continues to hamper victims' ability to seek redress through the criminal and civil justice systems, including their ability to recover for the financial losses that result. The September 11 attacks and the compensation programs that developed for the victims of that act of large-scale violence illuminate the unnecessarily restrictive requirements that continue to limit those seeking compensation through the state programs. The Article concludes by cautioning against the development of separate programs for victims of crime and victims of terrorism, and urges a broader approach that acknowledges the challenges and realities victims face as they seek to recover from violence.

II. State Crime Victim Programs

Victims of domestic and sexual violence seeking compensation from government programs can attempt to recover their financial losses through restitution or through state victim compensation programs. This Part first briefly describes restitution, including its history, current status, and its promise and limitations as a source of compensation for victims. It then addresses the related but distinct evolution of state victim compensation programs.⁴⁰ Both emerged from and are ancillary to the criminal justice system. As such, they each are limited in the relief they offer to victims.

A. Restitution

Systems of restitution, in which the perpetrator compensates the victim for her losses, have taken various forms since ancient times.⁴¹ *178 As governments assumed increasing responsibility for prosecuting crime and as crimes were viewed as committed against the state, not the victim, fees and penalties imposed on defendants increasingly were paid to the state rather than the victim, and victims could recover damages only through special civil tribunals.⁴² The United States became interested in restitution in the 1930s, as interest in reforming the criminal justice system and addressing victims' resulting needs grew.⁴³ Arguments that restitution could have a corrective effect on the offender helped support the development of restitution systems.⁴⁴ Some states began to enact penal laws permitting restitution as part of suspended sentences and probation.⁴⁵

Federal funding for restitution programs first became available in the 1970s.⁴⁶ In 1982, Congress enacted the Victim and Witness Protection Act.⁴⁷ That law required federal judges to order full *179 restitution in criminal cases.⁴⁸ In 1994, a section of the Violent Crime Control and Law Enforcement Act made restitution mandatory in federal convictions for sexual assault or domestic violence offenses,⁴⁹ and in 1996, restitution was made mandatory in all cases of federal violent crime.⁵⁰ Restitution orders are enforced by the United States and treated as final judgments.⁵¹

Today, all states have statutes addressing restitution; however they vary widely in their scope of coverage and the extent to which they are enforced.⁵² Restitution has been recognized as one of the “most under-enforced victim rights” available through the criminal justice system.⁵³ By contrast, restitution is also one of the most significant factors affecting victims' satisfaction with the criminal justice process.⁵⁴

Restitution is not likely ever to be sufficient to ensure full victim compensation. First, it is only available in cases in which the *180 perpetrator is apprehended and convicted.⁵⁵ By definition, then, it is less useful for victims of domestic and sexual

violence, crimes for which underreporting, underprosecution, and low conviction rates are notorious.⁵⁶ In addition, many restitution statutes only authorize payment of the victim's out of pocket expenses, not lost future earnings.⁵⁷ Moreover, as commentators addressing restitution in the context of victim compensation almost uniformly argue, offenders frequently are unavailable or have inadequate resources.⁵⁸ Although that premise undoubtedly holds merit, it is worthy of critical review. Offenders of all income levels commit violent crimes, notwithstanding the higher representation of the poor among victims.⁵⁹ As the National *181 Institute of Justice concluded, improved collection efforts could result in substantial increases in revenues.⁶⁰ A more comprehensive approach to victim compensation might include, though not to be limited to, increased support for enforcement of the restitution statutes already on the books in every state.

B. Victim Compensation Programs

1. History and Programmatic Evolution

British social reformer Margery Fry is widely credited for bringing public attention to victims' needs for adequate compensation.⁶¹ Her newspaper articles in the 1950s and 60s described the inadequacy of the existing restitution-based system for compensating victims of violent crime.⁶² She brought to light the paltry sums ordered paid and the improbability of victims receiving full compensation given the lengthy payment schedules afforded defendants.⁶³ Fry's articles were the impetus for public analysis and debate, which gave rise to a noted public symposium on compensation, a British government-sponsored study of worldwide restitution systems, and, subsequently, a British government white paper on victim compensation, which recommended enactment of a public program.⁶⁴

New Zealand implemented the first crime victim compensation program in 1964.⁶⁵ It authorized compensation for expenses, pecuniary loss, and pain and suffering resulting from crimes included on a specifically enumerated list.⁶⁶ The program was publicly funded, although the government would attempt to recover amounts paid to the *182 victim from the offender.⁶⁷ Britain's victim compensation program came into effect very shortly thereafter.⁶⁸ Like New Zealand, the British scheme was to be administered by a board with appointed members, whose decisions were deemed final.⁶⁹ Victims could be compensated for personal injuries resulting from any criminal offense in which the damages exceeded a threshold amount, the crime was reported to police without delay, and where the applicant submitted to a medical examination.⁷⁰ The scheme contained several exclusions. For example, it would not cover maintenance of a child conceived as a result of rape.⁷¹ It also reduced payments in amounts proportional to the victim's responsibility for the crime, therefore reflecting the notion that only "innocent" victims could recover.⁷² Like New Zealand, the program was funded by tax dollars, and would not award payments that would duplicate amounts recovered through the tort or other systems.⁷³

Reformers in the United States became interested in victim compensation programs around the same time.⁷⁴ In 1964, California became the first state in the United States to enact a victim compensation program.⁷⁵ Several states quickly followed, and today, all fifty states, the District of Columbia, and the Virgin Islands operate *183 victim compensation programs.⁷⁶ Federal funding for these programs first became available in 1974.⁷⁷

Congress took a major step toward institutionalizing support for the state programs when it enacted the Victims of Crime Act of 1984 (VOCA),⁷⁸ after over a decade of debate.⁷⁹ First introduced in 1972, the initial proposal would have provided compensation to victims of federal crimes and grants to the states that then operated qualifying victim compensation programs.⁸⁰ The proposal contemplated compensating victims for their "net losses," which included costs such as medical expenses, lost past and future earnings up to a statutorily capped rate, and associated costs for child care.⁸¹ It excluded

compensation for pain and suffering and property loss.⁸² The initial proposals reflect several concerns that continue to animate program ***184** requirements and limitations. First, the federal compensation program would only cover costs that were not covered by other sources.⁸³ In addition, Congress sought to ensure that the program serve only “innocent” victims.⁸⁴ It also required that claimants “cooperate” with law enforcement authorities in order to receive compensation.⁸⁵ Similarly, claimants must have promptly reported the crime, unless they could show good cause for the delays.⁸⁶

Congress cited several rationales in support of the federal program. A 1976 House Report relied on a governmental “failure to protect” theory, justifying compensation programs on the theory that an individual victimized by a criminal attack has suffered both society's failure to eliminate crime in general and law enforcement's failure to prevent the particular crime.⁸⁷ Congress saw society's duty to compensate the victim as compounded by its prohibition against the individual's taking the law into her own hands.⁸⁸ Congress also cited the notion that compensating victims would encourage cooperation with law enforcement and help reduce the alienation many felt about ***185** the criminal justice system.⁸⁹ Finally, Congress recognized the pragmatic need for government compensation because other means, such as insurance, public welfare, charity, and restitution, were inadequate.⁹⁰

In 1982, President Reagan appointed a President's Task Force on Victims of Crime, which issued its Final Report in December of that year.⁹¹ Among other things,⁹² the Task Force recommended that Congress enact legislation to provide federal funding to assist state crime victim compensation programs.⁹³ Significantly, the Final Report recommended a federal program that would increase criminal defendants' fines and fees to “ensure a program that is both administratively efficient and self-sufficient, requiring no funding from tax revenues.”⁹⁴ The crime victim compensation legislation subsequently introduced in Congress incorporated many of the recommendations from the Final Report.⁹⁵ Perhaps most important of these was a provision establishing new penalty assessments and fines, which were designed to produce an increased revenue stream for the new program.⁹⁶ Accordingly, the 1984 legislation authorized the deposit of penalty assessment fees and public donations authorized for ***186** the purpose of compensating crime victims, into a fund that would form the basis of payments to the states for victim compensation and assistance programs.⁹⁷

The legislation's stated purposes included addressing the inability of the then-existing state programs to “adequately protect and assist” crime victims; a recognition that “successful operation of the criminal justice system depends on the welcome participation of witnesses” and an acknowledgement that the states and the federal government share a joint responsibility for assisting victims of crime.⁹⁸ Thus, the legislation was premised on the theory that the programs would assist the operation of the criminal justice system and reflected a general social welfare notion of responsibility for the crime victim.⁹⁹ However, its enactment undoubtedly was facilitated by the fact that the operational scheme required no expenditure of taxpayer dollars.¹⁰⁰

2. Program Structure, Benefits, and Requirements

As currently enacted, state victim compensation programs in the United States reimburse victims of nearly every type of violent crime for expenses such as medical care, mental health counseling, lost wages, and, where appropriate, funeral expenses and loss of support, although specific program benefits and requirements vary from state to state.¹⁰¹ In 1996, Congress amended VOCA to authorize compensation awards to victims of terrorism as well as to victims of the other qualifying crimes.¹⁰² Notably, New York's Crime Victim Compensation Board, the state's victim compensation program, was among the first programs to make cash assistance available to victims of the September 11 attacks; compensation programs from other states played an invaluable role in helping victims as well.¹⁰³

***187** States with compensation programs that meet legislatively specified criteria are eligible to receive VOCA matching funds.¹⁰⁴ Recognizing that victims need support services as well as compensation, VOCA funds victim assistance programs

as well.¹⁰⁵ One of the most notable and least publicized facts about the VOCA programs is that virtually no public funds are expended for these programs; VOCA is funded entirely by federal criminal fines and penalties.¹⁰⁶ State expenditures on victim compensation programs also are funded predominantly by criminal fines and penalties, although a few states complement those monies with small amounts of general revenue funds.¹⁰⁷ When both federal and state sources are taken into account, approximately 90% of funding for state victim compensation programs is derived from offender fines and penalties.¹⁰⁸ As a result, funding levels for victim compensation programs vary depending on the amount of fines collected from defendants in a given year.¹⁰⁹

***188** In 2001, the latest year for which the Office for Victims of Crime reported data, upward of \$360 million was paid to over 146,000 crime victims for expenses including medical, dental, and mental health expenses; lost wages and loss of support; funeral and burial expenses; crime scene clean up; forensic sexual assault exams; and other expenses.¹¹⁰ Domestic violence and child abuse survivors (including sexual abuse) each accounted for approximately 20% of the reported claims, while sexual assault accounted for approximately 7% of all claims.¹¹¹ Although VOCA authorizes payments for terrorism-related injuries, only eighteen claims based on terrorist attacks were filed in 2001, representing less than 0.01% of all claims.¹¹² Presumably, after September 11, that number has substantially increased, given VOCA's role in funding compensation for victims of the September 11 attacks.

The programs represent a tremendously important resource for victims of domestic and sexual violence. Systemic barriers that frequently prevent victims from recovering from offenders or through other tort actions make a government program all the more potent.¹¹³ However, limited resources and resulting programmatic restrictions curtail the state programs' ability to meet victims' needs.¹¹⁴ As a ***189** National Institute of Justice report evaluating the compensation programs observed, “the theory behind victim compensation could support a more generous level of financial assistance to a far larger class of victims than most programs now recognize as deserving.”¹¹⁵

Programs restrict eligibility in several ways. For example, to comply with VOCA, program requirements limit awards to “innocent” victims, and require that the applicant facilitates law enforcement prosecution efforts.¹¹⁶ Applicants must report the crime promptly to law enforcement, must cooperate with police and prosecutors in the investigation and prosecution of the crime, and must submit a timely application to the compensation program.¹¹⁷ VOCA imposes other limitations as well. For example, it caps the amount that states can spend on administrative expenses at a maximum of 5% of the amount of federal funds provided.¹¹⁸ This restriction consequently limits programs' abilities to develop infrastructure, enhance claims handling, and conduct outreach.¹¹⁹ VOCA's restrictions suggest an underlying mistrust of victim behavior more typical of government approaches to traditional public benefit programs than the 9/11 Fund's “victim-friendly” orientation.

In contrast to the unlimited funding and demand for full compensation that characterize the 9/11 Fund, the state victim compensation programs' structures reflect their scarce resources, and accordingly mandate modest awards and restrictive eligibility ***190** requirements.¹²⁰ All states cap the funds victims can recover at amounts ranging from \$5000 to \$180,000, with an average cap of approximately \$35,000.¹²¹ In 2001, the median award nationally was \$2400.¹²² Every state regards its victim compensation program as the “payer[] of last resort,” so that the program will only pay expenses that are not covered by other sources.¹²³

From the programs' inceptions, restrictions were designed to limit eligibility. Notably, however, to program administrators' and Congress's credit, some of the early program restrictions were eased to ensure that victims who needed assistance could participate. For example, domestic violence victims initially were excluded due to eligibility requirements precluding family

members of the offender from recovering.¹²⁴ Once this problem was recognized, VOCA was amended to require states to allow domestic violence victims to receive compensation funds.¹²⁵

Despite these modifications, program limitations continue to thwart victims' ability to recover. Program administrators and program evaluators alike perceive the programs as underutilized and recognize that many eligible victims are unaware of program benefits.¹²⁶ One study concluded that only between one-quarter and one-half of eligible ***191** victims are served by the state programs.¹²⁷ Program administrators reported that traditionally underserved groups, such as victims of domestic violence, elder abuse, child physical and sexual abuse, and adult sexual assault, underutilized the programs, as did non-English speakers and racial minorities.¹²⁸ Researchers attributed the underutilization to restrictive eligibility criteria and/or insufficient outreach and education.¹²⁹ Of those that filed, two-thirds still reported a median of \$600 in unrecovered losses.¹³⁰ Overall, white female claimants were more satisfied than male or minority claimants with their experiences with the compensation programs.¹³¹

Among those who do file, a range of restrictive requirements preclude victims from accessing needed assistance. For example, many programs' interpretation of "innocent" victims precludes individuals with any criminal record from recovery, rather than limiting the exclusion to those who committed the crime giving rise to the compensation claim.¹³² Accordingly, individuals who had been convicted of unrelated crimes could not receive funds, even when the prior crime took place many years prior to the crime giving rise to the claim. Although this requirement undoubtedly originated in an attempt to ensure that only "law abiding" individuals receive ***192** compensation, it can produce a harsh result.¹³³ In addition, despite the fact that the state programs were enacted to recognize the particular harms that result from crime, and therefore to compensate victims regardless of financial status, some states condition eligibility on financial need.¹³⁴ Although those requirements may help states focus scarce resources on those who need them the most, they also can prevent victims from obtaining the assistance they need to recover from the violence.¹³⁵

Perhaps most significantly, requirements that victims promptly report and cooperate with the police may prevent victims who fear retaliation from the perpetrator or who mistrust law enforcement for other reasons from obtaining assistance.¹³⁶ This requirement falls ***193** particularly harshly on domestic and sexual violence victims, people of color, and members of immigrant communities.¹³⁷ It also can deter crime victims who face the common challenge of not being able to take time off from their jobs to participate in the frequent calls of the ***194** criminal justice system.¹³⁸ And it may preclude the many victims who delay reporting due to the common experiences of fear, shame, shock, and trauma, each of which may be exacerbated for victims of domestic and sexual violence, from recovering at all.¹³⁹

In sum, although the programs represent an invaluable resource, a range of programmatic reforms would enable them to more effectively fulfill their goals of helping victims recover from crime.¹⁴⁰ The contrasting generosity of the response to the September 11 attacks highlights the unnecessary restrictions of the state crime victim compensation programs' requirements. For example, state programs may exclude members of nontraditional families from recovering when they lose their life partners due to crime. Before September 11, New York's Crime Victim Board excluded victims whose gay life-partners were killed in homicides from recovering funds because they did not fit the state's definition of "spouse," although married partners automatically would receive payments for loss of support.¹⁴¹ In the ***195** aftermath of the attacks, New York Governor Pataki issued an executive order that would allow gay partners of individuals who died in the attacks to recover for loss of support in the same way as married heterosexual couples.¹⁴² Subsequently, the state's rule was permanently changed to allow gay partners of victims of other crimes to recover as well.¹⁴³ Similarly, Pennsylvania Governor Tom Ridge authorized a change to the Pennsylvania program's existing practice to allow "significant others" of those killed as a result of the September 11 attacks to recover under that state's victim compensation fund.¹⁴⁴ This example illustrates how "sympathy" for victims of the

September 11 attacks has shone a light on, and effectively changed, one unnecessarily restrictive state victim compensation policy. It suggests that other restrictive program requirements may unnecessarily bar victims from receiving the assistance they need as well.

III. The 9/11 Victim Compensation Fund

The 9/11 Fund emerged from a very different context and reflects a very different view of victim compensation. Congress enacted it with minimum debate or study, as part of a bill addressing the financial sustainability of the airline industry.¹⁴⁵ The legislation was born in reaction to a national emergency, and reflects an attempt to *196 respond to an unprecedented affront to the country's safety and security. The victims of the attacks were unquestionably seen as "innocent" and "deserving" of adequate compensation. Concern for fraud was minimal and budgetary limitations were nonexistent.¹⁴⁶ The program's design accordingly encouraged victim participation and met victims on their own terms.¹⁴⁷

The question of the award amounts received the most attention, and ultimately may prove most important to victims in their assessment of the program. The amount of reimbursement available to victims cannot be underestimated in assessing the effectiveness of a victim compensation program. However, other aspects of program administration, such as outreach, public education, concern for administrative efficiency, and support for victims utilizing the program, also are critical to a program's effectiveness. Putting the issue of award amount to the side, the 9/11 Fund can be seen as a case study of how victim compensation might be approached in the absence of budgetary restrictions and latent bias against victims.

A. Program Structure, Benefits, and Requirements

Congress created the 9/11 Fund as part of the Air Transportation Safety and System Stabilization Act (ATSSSA), eleven days after the attacks.¹⁴⁸ In enacting the program, Congress responded to the airline industry's financial concerns following the attacks, which were heightened by the ban on air traffic, cancelled trips, and the prospect of potential liability associated with the attacks.¹⁴⁹ The ATSSSA delivered a range of benefits to the airline industry, including federal loan guarantees of up to \$10 billion, compensation of up to \$5 billion in grants to cover direct losses attributable to the attacks, compensation for "incremental losses" for the period between the attacks and the end of that calendar year,¹⁵⁰ and reimbursement for increases in the cost of insurance.¹⁵¹

*197 The 9/11 Fund was enacted as part IV of the ATSSSA, with the stated goals of providing compensation and a no-fault alternative to tort litigation to individuals and their families who were killed or injured as a result of the attacks.¹⁵² In exchange for waiving their rights to sue,¹⁵³ families of those killed in the attacks, and those injured as a result, were promised "swift, inexpensive, and predictable resolution of claims."¹⁵⁴ Victims would receive full compensation.¹⁵⁵ Awards would be funded by the United States Treasury, with no limit placed on the total program budget.¹⁵⁶ In this sense, the 9/11 Fund represented an unprecedented expenditure of public funding for compensation of victims of violent criminal wrongdoing.¹⁵⁷ To the extent that victim compensation was included in order to facilitate the airlines' financial recovery, the compensation aspect can be seen as ancillary to the bill's main purpose, not unlike the way the state compensation programs are ancillary to the criminal justice system.

*198 The ATSSSA includes a series of provisions designed to protect the airline and related industries by discouraging victims from pursuing tort actions and encouraging program participation.¹⁵⁸ For example, it promised claimants a certain and timely determination of their claims.¹⁵⁹ It eliminated the uncertainty of tort litigation because claimants were not required to prove liability or causation, and would have no problems with enforceability.¹⁶⁰ Claimants could obtain a nonbinding estimate of

what their award would be before they chose to file, could elect a process through which their applications would receive expedited review, and could request a review before the Special Master if they were unsatisfied with the determinations.¹⁶¹

Significantly, the calculation of award amounts was designed to be sufficiently substantial to discourage private litigation.¹⁶² While the precise approach was the subject of much discussion and debate, the ultimate compensation awards included calculations of both economic and noneconomic losses with presumptions and caps that reflected the Special Master's concerns for horizontal equity.¹⁶³ Based on those *199 calculations, the program presumed that awards rarely would exceed \$3 million, and rarely would be lower than \$300,000.¹⁶⁴ The Special Master retained discretion to override the presumed amount derived from the awards tables and flat amounts, and make an individualized award based on the facts of the particular case.¹⁶⁵ Although award levels were higher than any other government-funded benefits program, high-earner families criticized the approach as penalizing the financially successful.¹⁶⁶

As a victim compensation program that sought to encourage participation, program initiatives designed to assist and accommodate victims warrant examination. For example, the program provided walk-in centers throughout the country in which claimants could fill out applications.¹⁶⁷ A modern Web site described the 9/11 Fund's *200 benefits and application procedures, with information available in English and Spanish.¹⁶⁸ Claimants could schedule appointments on Saturday as well as during regular business hours.¹⁶⁹ Fund officials spent countless hours with claimants, helping them negotiate the application process.¹⁷⁰ As counselors of other victims of crime and trauma know well, the emotions associated with filing a claim can interfere with a victim's ability to complete the process, and assistance in completing claims forms can be invaluable.¹⁷¹ To encourage participation and filing before the filing deadline, the 9/11 Fund conducted an extensive public education campaign.¹⁷² Although this myriad of victim-friendly efforts may have been developed in order to discourage litigation rather than to advance a philosophical commitment to a victim-centered program, they nevertheless exemplify programmatic efforts to facilitate applications and processing in a way that resource-strapped state victim compensation programs cannot sustain.

***201 B. Legislative History and Approach to Compensation**

The 9/11 Fund's unique history and structure have given rise to scholarly debate about its nature and theoretical underpinnings.¹⁷³ Given that creation of the 9/11 Fund was debated for less than three hours before its enactment,¹⁷⁴ the process of teasing out the theory on which it was based is necessarily one of analysis in hindsight, and involves some amount of speculation. On first review, the analogy to tort seems a near-perfect fit. The basic structure of awards consists of both economic and noneconomic damages designed to provide "just compensation"—the expected recovery in tort.¹⁷⁵ In some ways, the 9/11 Fund can be seen as importing a class action settlement approach—perhaps for the first time—to a definable class of crime victims.¹⁷⁶

However, as a developing body of scholarship elucidates, the 9/11 Fund deviates from a traditional tort model in numerous ways.¹⁷⁷ First, the 9/11 Fund shields potential defendants from liability while failing to exact any contribution that could serve the deterrent interests of the tort system.¹⁷⁸ The government's decision to foot the bill is particularly *202 unusual in light of the substantial questions about the viability of tort claims against the airlines or other entities protected by the 9/11 Fund.¹⁷⁹ In contrast to the individualized determinations of loss that characterize tort recovery, the 9/11 Fund presumes a common experience among victims, uses presumptive schedules to calculate economic loss, and applies a flat figure to award noneconomic damages.¹⁸⁰ In addition, the 9/11 Fund's reduction of awards by "collateral sources," marks a significant departure from the individualized inquiry required by the tort system.¹⁸¹

The 9/11 Fund's emphasis on fair and adequate compensation for victims, particularly when considered in the political and social context surrounding its enactment, suggests that compassion for the victims played a role in the 9/11 Fund's enactment in addition to the desire to protect the airline industry.¹⁸² The Interim Rule refers to the 9/11 Fund *203 as “an unprecedented expression of compassion” by the American people for the September 11 victims and their families.¹⁸³ The reference is not surprising given the number of public comments describing the 9/11 Fund as “a testament to Congressional and taxpayer generosity.”¹⁸⁴ The unprecedented level of charitable giving also reflected the public's desire to take care of the victims.¹⁸⁵ Some have suggested that a public sense of “collective unity” or “defiance” may have spurred the government to craft a solution that adequately addressed the victims' needs.¹⁸⁶ Given this sentiment, public opinion may not have tolerated protracted and contentious litigation over liability.¹⁸⁷

Although the 9/11 Fund's legislative history is minimal, it offers some insight into Congress's intent. Congress's primary concern was protecting the airline industry's fiscal viability.¹⁸⁸ However, Congress also was concerned that victims receive compensation even if the airlines or other corporate defendants would be found not liable, or if insurance funds were exhausted.¹⁸⁹ As Senator McCain put it:

*204 No amount of money can begin to compensate the victims for their suffering. . . . The intent of the fund is to ensure that the victims of this unprecedented, unforeseeable, and horrific event, and their families do not suffer financial hardship in addition to the terrible hardships they already have been forced to endure.¹⁹⁰ Similarly, Senator Leahy expressed this compassionate view of victims' needs: “The heart of every American aches for those who died or have been injured because of the tragic terrorist attacks . . . on September 11th. Our first priority should be ensuring that [the victims'] needs are met and that they receive adequate compensation.”¹⁹¹ He saw a collective responsibility to provide “fair compensation,” which would be provided through a plan that offers “prompt filing, quick review, and prompt payments” as best addressing victims' needs.¹⁹² Senator Hatch similarly expressed his concern for victims, describing the 9/11 Fund as a “generous administrative remedy.”¹⁹³ Other members expressed their concerns for adequate victim compensation as well.¹⁹⁴ Thus, while the program structure reflects an attempt to approximate tort remedies, it additionally was *205 driven by a concern for the victims that could be characterized as humanitarian, or serving social welfare.¹⁹⁵

Public sentiment demanded that victims be given full compensation with a minimum of administrative difficulty. In this sense, the public view of victims was starkly different than that generally directed to other victims of violent crimes. Newspaper articles expressed outrage that victims were required to complete multiple forms and to submit the same information several times.¹⁹⁶ The public discourse notably lacked the focus on administrative controls to ensure against problems such as fraud that typically accompany other compensation or public benefit programs.¹⁹⁷ The level of sympathy expressed may rightly be unique, as is the awarding of tort-like damages without contribution by any wrongdoer. Nevertheless, the driving demand that the program offer efficient *206 application and processing procedures that are responsive to victims' experiences and needs raises important questions about the absence of the same kind of unmediated empathy and compassion for victims of sexual and domestic violence or other crimes.

IV. Contrasting Perceptions and Realities: Victims' Circumstances and Program Rationales

To help assess what lessons can be learned from comparing these two programs this Part will address two fundamental questions. First, it will analyze the similarities between the groups served by the two programs to answer the question of the extent to which the comparison makes sense. Second, it will compare the salient goals and rationales invoked in support of the respective programs.

A. Victim Experiences

At first blush, when the 9/11 Fund and the state compensation programs are compared, they may seem too different to merit comparison. However, a closer look at the experiences of those the respective programs were designed to help reveals important similarities in the circumstances facing the victims. The following vignette starkly illustrates those similarities. In it, a victim services advocate recounts a client meeting that took place in September 2001:

It was a beautiful September afternoon when I greeted a client named Clara at a Safe Horizon¹⁹⁸ office. She was visibly shaken and on the verge of tears. She came to my office seeking assistance, but she was not exactly sure what she needed. She had simply been told that Safe Horizon could help. I did the best thing I could for her at that moment, which was to listen. Clara told me that she was not used to talking about the personal details of her life. She always had managed to deal with everything herself. But now she needed to talk, and she began to tell me about her husband, her children, her family, and the sense of security that had vanished from her life.

She was scared. She had 3 young children and was overwhelmed with the thought of trying to explain to them the tremendous changes *207 that were about to happen in their lives. How was she going to help them to understand that their father wasn't going to be living with them anymore?

Theirs had been a one-income family--she had been solely dependent on her husband's salary and was not sure how she was going to keep the family together and make ends meet. Clara didn't know how she would pay for things she had always taken for granted and how she was going to keep things "normal" for her children. The vignette went on to explain that the advocate

remembered this day quite vividly--it was September 10th. Clara had just left her husband after over 10 years of living in a physically and verbally abusive marriage. She finally decided to leave because she saw what the violence was doing to her children and did not want them to be hurt. I knew that like most domestic violence victims she had a tough road ahead of her.

The two groups of victims are similar in several significant respects. First, victims of both terrorism and other crimes are harmed by a violent criminal act. Both may be reliant on the government for prosecution of the wrongdoers, and both may face slim prospects of vindication through the criminal justice system. Because of the similarity of violent victimization, both are eligible for compensation under programs funded by the federal Victims of Crime Act of 1984.¹⁹⁹

Second, terrorist attacks such as those committed on September 11 and acts of domestic and sexual violence are acts of wide-scale violence that affect large numbers of people in similar ways.²⁰⁰ In a sense, the families of the September 11 victims and those injured by the attacks all suffered as a result of one act, or series of acts, of terrorist aggression. Given the unity of the act, the victims were readily understood to suffer similar responses to the trauma.²⁰¹ Although less frequently recognized, acts of domestic and sexual violence also share common attributes, and victims experience *208 common emotional reactions.²⁰² Both groups of victims may experience Post-Traumatic Stress Disorder and other psychological reactions to the violence-induced trauma, and may require similar types of services as a result.²⁰³

Third, the violence produces economic hardship for both groups of victims.²⁰⁴ What distinguishes both groups from others who have suffered economic hardship as a result of wrongdoing is that it may be difficult, if not impossible, for victims of violence to recover damages *209 from the offender.²⁰⁵ Of course, survivors who have lost a family member to an act of violence may avail themselves of a different range of legal remedies than those available to individuals who themselves are injured as a result of violence.²⁰⁶ Both groups, however, typically cannot rely on insurance policies as a source of compensation.²⁰⁷

Notwithstanding these similarities--surviving violence, experiencing shared trauma, losing income, and facing numerous barriers to economic recovery--the September 11 terror attacks undoubtedly can be seen as *sui generis* because they were the

first large-scale terrorist attacks on American soil by foreign actors. In contrast to more common crimes, the acts were beyond the risks we ordinarily assume in the normal course of daily affairs.²⁰⁸ In addition, terrorist attacks can be distinguished from “ordinary” crime and seen as the fruit of a calculated, ideological campaign to instill fear, suspicion, and violence.²⁰⁹ Unlike many crimes, which are directed at an individual, or committed seemingly at random, the September 11 attacks can be seen as being directed at all Americans.²¹⁰ In that sense, however, the attacks may not be dissimilar from gender-based and other forms of hate crimes, which similarly inflict harm beyond the individual, on the entire targeted community.²¹¹

***210** The distinctions may appear clear when viewed through the lens of the September 11 attacks. However, the difference between terrorism and other crimes blurs when one considers other, more insidious acts that may also be considered “terrorist.” For example, Israel has a longstanding and extensive benefits program for victims of terrorism, and a newer, more limited program for victims of crime.²¹² In that country, the classification of an act as “terrorist” or a “crime” is in many cases unclear and subject to varying interpretations.²¹³ In a broader sense, the analogy between domestic violence and terrorism is even more direct. Domestic violence has been described as a form of private terrorism, in recognition of the inherent similarities between the two types of violence.²¹⁴ Both operate on large scales, target ***211** individuals based on their identity, and serve to intimidate a broader community beyond the individual victim.²¹⁵

Thus, at least four elements are common to victims of terrorism and victims of domestic and sexual violence: similar harm produced through a violent, criminal act; infliction of harm on a wide scale; economic ramifications; and the difficulty of private recovery. The next sections will compare the goals and rationales that have led to such disparate approaches for these not-so-dissimilar victims.

B. Program Goals and Rationales

Crime victim compensation programs have received scant theoretical examination since VOCA's enactment in 1984.²¹⁶ This section will revisit and assess the arguments that have been propounded to support victim compensation programs in the wake of renewed attention to compensation for crime victims in the aftermath of September 11.

The most robust debate about publicly funded victim compensation programs took place in the late 1950s and into the 1960s, the period preceding enactment of the Great Britain and New Zealand programs and the first state programs in the United States.²¹⁷ ***212** Various related rationales were propounded. For analytic purposes, this section will group the rationales into the following categories: (1) legal obligation, (2) social welfare, (3) shared risks, and (4) support to the criminal justice system. Traces of all but the legal obligation theory are reflected in current compensation programs. To these, the 9/11 Fund adds a “tort-replacement” rationale as an alternative approach.²¹⁸ This Part will examine the extent to which these approaches advance the fundamental goals of compensation systems: the dual purposes of replacing financial losses and making amends for them.²¹⁹ As this analysis will show, the “shared risk” and “tort replacement” rationales hold the most promise as foundations for future approaches to crime victim compensation.

1. Legal Obligation

One argument advanced in support of government-funded victim compensation programs can be coined the “legal obligation” theory. It is based on the premise that the government has an absolute duty to protect its citizens from crime.²²⁰ As Justice Goldberg stated in a prominent article advocating the development of victim compensation programs: “The victim of a robbery or an assault has been denied the ‘protection’ of the laws in a very real sense, and society should assume ***213** some responsibility for making him whole.”²²¹ The theory rests on the idea that the state has taken responsibility for prosecuting crimes out of the hands of individuals by creating police forces, courts, and correctional institutions; by taxing citizens to

maintain those institutions; and by limiting citizens' abilities to arm and thereby protect themselves.²²² Fines and imprisonment, which take offenders out of the workforce and therefore eliminate their earning capacities, further limit victims' abilities to recover from offenders.²²³ The argument resembles a classic assumption of duty theory: because the state has undertaken the burden of protecting its citizens, it is liable to reimburse citizens whom it fails to protect, and who have reasonably relied on the state's performance of that duty.²²⁴

In a variation on that argument, Professor Childres argued that society is responsible for the costs of crime because “the failure of police protection” is “a prerequisite to any crime.”²²⁵ He also reasoned that because American institutions are “remarkabl[y] unresponsive” to the causes of crime, their “minimal responsibility” extends to “repairing the human damage that results.”²²⁶

Since the legal obligation rationale was raised in the early 1960s, the approach it represents has been widely discredited in the United States. Courts have rejected the notion of the state's legal responsibility for harms caused by its failure to care for citizens.²²⁷ *214 Although nothing precludes its resurrection, this theory is not likely to support compensation programs in the near future.

2. Compensation Schemes as Social Welfare

Victim compensation programs can also be justified under a social welfare theory predicated on the idea that a state owes a humanitarian obligation to victims of crime.²²⁸ Although social welfare is not the primary expressed rationale for the 9/11 Fund, it is one of the more commonly articulated rationales underlying the state victim compensation programs. Advocates supporting government-sponsored victim compensation programs in the 1960s premised their arguments to a large extent on a social welfare rationale.²²⁹ They viewed crime victim compensation as an outgrowth of modern democracy's moral responsibility to help those who are sick and *215 injured.²³⁰ In Great Britain, Margaret Fry argued that society's “collective responsibility for sickness and injury” and its “modern” systems of sharing the cost of social risks, warranted public provision of assistance for victims.²³¹ She invoked the work of eighteenth-century philosopher Jeremy Bentham, who reasoned that offenders should be held responsible in the first instance for compensating victims for the losses that result from crime, but that if the offender lacks assets, victims should be paid “out of the public treasury, because it is an object of public good and the security of all is interested in it.”²³² As Bentham framed the problem, the community ought to be taxed to repair the damage caused because it bears responsibility for violent offenses.²³³ Along those same lines, Justice Goldberg argued that the U.S. government should compensate crime victims because crime reflects society's inattention to poverty and social injustice.²³⁴ Any program derived from these principles and paid for by public funds could be seen as a form of distributive justice, with the compensation program determining the criterion by which the burden of crime would be distributed.²³⁵

Nevertheless, the United States implicitly rejected a social welfare approach by devising a funding stream that did not require public funding, which is generally the hallmark of a social welfare program.²³⁶ In this sense, the state programs and the 9/11 Fund bear an inverse relationship to government funding. Formally, the 9/11 Fund invokes private law tort principles, and is not framed in terms of social welfare, but awards are financed by government funds instead of the defendant in a tort action.²³⁷ By contrast, much of the rhetoric justifying state compensation programs rests in large part on social *216 welfare principles, although the U.S. programs rely almost exclusively on private, not government resources, for funding.²³⁸

The contrast is more stark when viewed through the lens of public perception: from a victim's perspective, the 9/11 Fund and the state crime victim compensation programs both offer funding to cover expenses resulting from similar losses, but the amount of available compensation and the depth of program resources varies tremendously. The explanation that the disparity is based on September 11 victims' waiver of their rights to bring lawsuits that have minimal chances of recovery may have

little resonance to the victim of domestic or sexual violence who also faces minimal chances of recovering in tort but has no comparable government program available as an alternative source of tort-type damages.²³⁹

3. Support to the Criminal Justice System

Another line of argument supporting crime victim compensation programs posits that helping the victim will advance the criminal justice system's essential functions of promoting prosecutions and convictions.²⁴⁰ This idea has several facets and deep historical roots. As early as 600 B.C., communities began to compensate crime victims when efforts to apprehend the criminal failed, as an incentive to improve prosecutorial efforts.²⁴¹ More modern arguments echoed this view that crime victim compensation could be a means of encouraging victims to cooperate with law enforcement officials in the prosecution of the crime.²⁴² Justice Goldberg went so far as to suggest that hinging victim compensation on prompt reporting to law enforcement would reduce the crime rate as well as help law enforcement with prosecutions.²⁴³

***217** The drafters of VOCA appear to have subscribed to this theory as well. The congressional findings accompanying the final version of VOCA reflect Congress's concern that public respect for the law would be diminished if steps were not taken to help victims.²⁴⁴ The findings also highlighted Congress's hope that the compensation program would advance the criminal justice system's need for victim cooperation.²⁴⁵ VOCA's requirements that compensation recipients must report the crime to the police and cooperate in the prosecution concretizes this theory in a very practical way.²⁴⁶ The concept represents a laudable goal. However, given factors such as the modest amount of available awards and the relative lack of awareness of the programs among victims, it is hard to imagine that the program itself would have a substantial impact on victims' willingness to cooperate with law enforcement.²⁴⁷

Another way to view the relationship between crime victim compensation and the criminal justice system is that compensation programs in the United States evolved out of a sense that crime victims were forgotten in the criminal justice system.²⁴⁸ Some have pro-pounded an "anti-alienation" argument, which sees compensation as a way of addressing the concern that victims who have suffered the hardship of crime and the ordeal of cooperating in a criminal prosecution will become disillusioned with society unless they are compensated for their losses.²⁴⁹ Like the argument above, the modest award amounts and lack of program visibility reduce the extent to which this theory may actually bear on victims' view of the criminal justice process. Thus, while the program undoubtedly evolved as an offshoot of the criminal justice system and holds the potential of enhancing it, the extent to which victim compensation may actually advance its interests is likely minimal at best.

***218** 4. Risk Spreading and Cost Sharing

An additional way of viewing crime victim compensation programs is as a way of distributing the costs of crime across society.²⁵⁰ This argument has continuing and valuable resonance, and bears review in light of our current knowledge about the economic impact of crime.²⁵¹ The theory figured prominently in arguments by early advocates of compensation programs. For example, Fry rested her advocacy in support of victim compensation programs on the idea that "modern" society's practice of sharing risks of many kinds should be extended to sharing risks resulting from crime.²⁵² She urged a system of public insurance analogous to workers compensation programs, funded by tax dollars, to cover a risk "to which each [citizen] is exposed."²⁵³ Other theorists similarly argued that criminal violence was "endemic" to society, and that losses resulting from such endemic harms should be spread.²⁵⁴

The state victim compensation programs embody an innovative approach to compensation that can be seen as building on this cost-sharing approach. The programs create a form of social insurance in which offenders pay the costs victims incur as a result of violent crimes.²⁵⁵ That this is accomplished without requiring victims to engage in litigation addresses the formidable

barriers to victims' abilities to recover damages directly from offenders that particularly affect victims of domestic and sexual violence.²⁵⁶ The use of offender ***219** fines and fees also advances the interests of corrective justice to some extent, as the offender is held accountable for repaying some of the losses to the victim.²⁵⁷ To the degree that defendant fines and fees comprise funds used to pay victims, the scheme may have some deterrent effects as well, although it is hard to imagine that the amounts recovered through fines, fees, and restitution would be sufficiently substantial to effect any change in offender behavior.²⁵⁸

Thus, the state programs reflect and arguably advance a vision of distributive justice that, while powerful, is incomplete. One aspect of distributive justice is that a system of allocating resources addresses the relationship between actors and their community.²⁵⁹ Accordingly, a more complete distributive justice vision would include contributions from government to help fill the inevitable shortfalls that result both from the limitations of fines and fees and from the inadequacy of traditional mechanisms for compensation, namely tort recovery and restitution.²⁶⁰

The 9/11 Fund advances a somewhat different vision of distributive justice, perhaps unwittingly, by the fact that the government has assumed the cost of victims' losses resulting from the terror attacks. Government funding could be defended as a way to spread the costs of the unexpected attack and to shield particular industries and individuals from bearing the cost when they played no role in creating the risk. However, the calculation of awards approximating tort damages rather than awards more closely tracking disaster relief or emergency payments is unprecedented for a government program absent an admission of state liability, and therefore is difficult, if not impossible, to defend and replicate.

***220** 5. Compensation Funds as Tort Substitutes

A final perspective would view the compensation programs as a substitute for damage awards victims of violence might otherwise be able to obtain through the tort system. Under this view, government might devise a compensation program for victims when tort damages are unavailable, or, as with the 9/11 Fund, when the government offers incentives for individuals to waive their rights to tort litigation. As discussed above, although not a perfect fit, the 9/11 Fund can most readily be seen as a substitute for the tort system, given Congress's concern for the airline carriers' and other potential defendants' financial stability and the resulting requirement that 9/11 Fund eligibility be predicated on claimants' waivers of their rights to sue.²⁶¹ Consequently, 9/11 Fund awards were structured to induce victims to forego their tort claims.²⁶² Award amounts include the basic elements of tort recovery: economic damages, including lost future earnings, and noneconomic damages, defined broadly to include pain and suffering and emotional distress.²⁶³ However, the program deviates in a fundamental conceptual way from the bedrock of traditional tort precepts--deterrence--because none of the potential defendants in a tort action make financial contributions to the 9/11 Fund.²⁶⁴ Of course, because the 9/11 Fund provides a benefit outside the tort system, it need not comply with the tort system's theoretical foundations. Nevertheless, it seems contradictory to justify large awards based on their equivalence to tort damages while not meeting the underlying concern of deterrence that drives the tort system's award calculations.

Scholars have identified ways in which the tort system would have proved inadequate for September 11 victims if it had been the only available avenue of recourse. Alexander has suggested that a tort-based approach is poorly suited to this type of public, mass disaster.²⁶⁵ She observed that the hijackers, who were the real "culprits," were likely to be unavailable, and it seemed unfair and ill-suited to the public interest to hold other possible negligent actors such as the ***221** airlines or premises owners liable, particularly because they also had suffered large losses.²⁶⁶ Rabin has raised several other limitations. First, the prospect of the airlines' potential insolvency would have left victims without meaningful remedies, assuming the unavailability of insurance coverage.²⁶⁷ Second, the protracted nature of tort litigation would have imposed financial burdens and emotional stress on a group of victims who already faced considerable burdens.²⁶⁸ Third, the individual assessment of damage and loss that characterizes the tort process would have led to perceptions of arbitrariness in a community that shared a special identity,

unlike many other tort claimants.²⁶⁹ Others have criticized the 9/11 Fund's use of a tort-based approach on the grounds that the use of government funds to pay for tort-scale damages is unprecedented and difficult to justify unless the government itself was releasing funds to compensate victims for its own role in the attacks.²⁷⁰

Unlike the 9/11 Fund, the state compensation programs bear no formal relationship to tort schemes.²⁷¹ The state programs do not require victims to waive their rights to bring tort claims.²⁷² Award amounts are not linked to tort recovery.²⁷³ However, as in the case of the 9/11 Fund, the state programs emerged, at least in part, because the tort system proved to be ineffective as a source of recovery for crime victims.²⁷⁴ In this way, the state programs can be seen as conceptually similar to the 9/11 Fund, providing an alternative means through which victims of violent crime can recover the costs incurred as a result.

Some have justified victim compensation programs as filling the gap left when existing public and private approaches fall short.²⁷⁵ *222 Under that conception, the extent to which crime victims can recover from the perpetrator is significant. Restitution seems to offer a ready alternative to tort that could achieve the goal of offender payments to victims without requiring victims to engage directly with the perpetrator. It furthers the goal of deterrence by holding offenders accountable, and advances corrective justice by requiring payment by the offender to the victim. However, as discussed above, restitution is widely recognized as an inadequate means to ensure victims of full recovery of their losses.²⁷⁶

An approach to victim compensation that acknowledges the limitations of the tort and restitution systems holds particular promise for victims of domestic and sexual violence. Of course, some domestic violence victims have recovered tort damages from their abusers.²⁷⁷ But systemic reasons prevent many from accessing recovery through the tort system. First, many victims, particularly those who are poor, have difficulty obtaining lawyers, and may not know that they may have legal claims.²⁷⁸ The lack of insurance coverage reduces the likelihood that attorneys will bring tort claims even when victims identify claims and talk with lawyers.²⁷⁹ In addition, domestic violence and sexual assault victims may have unique reasons to avoid voluntary litigation with the perpetrators of the crime.²⁸⁰ Victims of domestic and sexual violence frequently go to great lengths to minimize their interactions with the offenders, including obtaining legal protections such as protective orders.²⁸¹ *223 Batterers routinely use civil proceedings such as custody and child support matters to perpetrate the abuse.²⁸² Additional litigation, which ensures more contact, may be the last thing a survivor wants to initiate.²⁸³ For those reasons, the tort system may be systemically underutilized by and unavailing for these victims.²⁸⁴

Aside from efforts to hold the perpetrator accountable, some domestic and sexual violence victims successfully have brought tort claims against negligent third parties. For example, some victims have recovered in cases against landlords for premises liability and negligent security,²⁸⁵ or against employers for negligent hiring and supervision.²⁸⁶ For crime victims generally, efforts to hold gun manufacturers liable for losses resulting from violent crime may be emerging as a viable means of recovery.²⁸⁷ To the extent these actors *224 are held accountable through tort, portions of the damages award or settlement could be designated to be contributed to the crime victims' fund.²⁸⁸ These efforts reflect promising approaches to increasing the accountability of parties whose negligence played a role in facilitating the violence that could contribute to victim compensation funding if such payments became more commonplace.

C. Future Directions

The question whether to dedicate public funds to assisting victims of crime-- whether they are victims of terrorism, domestic violence, sexual assault, hate crimes, terrorism, or other crimes--may be an essentially political judgment about how scarce resources should be allocated. The public's willingness to dedicate an unprecedented amount of funds to assist victims of the September 11 attacks undoubtedly says something about our shared sense of compassion in a moment of national shock, anger,

and grief. However, it is hard to justify the absence of an analogous publicly supported compensation program that similarly reflects a shared sense of shock, anger, and grief about the systemic and enduring violence of domestic and sexual abuse.²⁸⁹ As an exemplar program for victims of crime, the 9/11 Fund illuminates the frequently unmet financial and practical needs victims of violence constantly face. The compassionate approach to victims reflected by the 9/11 Fund underscores the importance of addressing victims' needs with a minimum of barriers and bureaucracy.

Assuming that a traditional view of social welfare alone will not justify future programs, two of the approaches discussed above offer the most promise as foundations for future initiatives. The systemic unavailability of the tort system provides a strong argument for making *225 compensation programs available to victims for whom traditional sources of compensation, such as the tort system, will be inadequate. The cost-sharing approach exemplified by the state compensation programs and VOCA most effectively advances a form of distributive justice that leverages perpetrator responsibility and minimizes public expense. An approach that incorporated the “compassionate” approach to victims of the 9/11 Fund into the cost sharing funding mechanism of the state compensation programs would go a long way to serving these victims, whose needs otherwise may remain unaddressed.

V. Lessons from the Past and Questions for the Future

This study of contrasting victim compensation programs reveals several shortcomings in the existing approaches. First, victims' actual unmet financial needs have not been fully considered in the formulation of public compensation programs. For domestic and sexual violence victims, empirical data bolsters the case for public support because it describes the ways in which violence produces barriers to economic independence. It shows that failing to provide compensation for the losses that result from the violence will exacerbate victims' hardships, and may even jeopardize victims' safety. Second, the stark contrast between the generous and unquestioned support afforded the September 11 victims and our ambivalent and modest response to domestic and sexual violence survivors raises the question whether the historic and enduring bias that has infused our response to those victims may play a role in the divergent approaches to compensation. Finally, the contrast between the two programs raises important questions about the implications of such different treatment, and supports future initiatives that minimize, rather than reinscribe, historic biases.

A. Grounding Program in Data: Learning from Social Science

Empirical data quantifying victims' economic needs following a violent crime advances the question of whether the risks and costs of crime should be spread by describing what those costs are. As initially articulated, the victim compensation proposals rested on a relatively general conception of those risks and costs. For example, Fry discussed “sharing [the] risks” of crime much like other social costs *226 are shared through mechanisms of insurance.²⁹⁰ However, she did not detail either the type of financial assistance needed by victims or the risks to which they are exposed in the absence of that support.²⁹¹ Justice Goldberg recognized some of these particulars when he discussed the “burden of medical expenses, lost wages, and related expenses,” victims incur as a result of crime.²⁹² However, the arguments remained general as the parameters of the economic losses victims suffer were not explicitly enumerated.

More recent empirical data about victims' needs fill in the picture left open in the initial debates and underscore the importance of ensuring compensation to cover the economic losses resulting from crime. A recent National Institute of Justice study of victims of violent crimes reported that victims suffered many financial losses as a result of the crime, ranging from unreimbursed medical expenses, to lost property, to lost days of work.²⁹³ The study found that less than a quarter of the victims were aware of the state victim compensation programs, and even fewer applied.²⁹⁴ Nonwhites in particular reported that their needs for practical assistance in the aftermath of the crime remained unmet.²⁹⁵ Of those who suffered economic losses, nearly 90% paid for them out of their own pocket.²⁹⁶ Over 35% of victims who were employed lost days of work following the crime, and over

60% of those lost income as a result.²⁹⁷ Victims themselves regard practical financial assistance as key to their recovery from crimes, and one of the most important victim services available.²⁹⁸

A similar study focusing on the costs of intimate partner violence found that over 20% of victims who were raped and over 17% of those physically assaulted by an intimate partner lost time from paid work.²⁹⁹ Victims who were either raped or physically assaulted lost an average *227 of seven to eight days of paid work as a result of the crime.³⁰⁰ The overall value of rape victims' lost productivity resulting from lost days of work has been estimated to be over \$580 million each year.³⁰¹ Victims of intimate partner violence overall lost a total of nearly \$150 million a year in associated medical expenses, broken or stolen property, and lost pay.³⁰² Those costs figure prominently in individuals' lives and their abilities to recover from the crimes.

The case may be particularly acute for victims of domestic violence and sexual assault, who together comprise close to a majority of the cases currently filed with the state crime victim compensation boards.³⁰³ In addition to the costs itemized above, these victims face even more stark barriers to recovering from the offender due to fear of retaliation and continued abuse.³⁰⁴ Domestic violence victims' financial dependence on their abusers may prevent them from leaving their batterers.³⁰⁵ Studies increasingly document the economic toll domestic and sexual violence takes on its victims. Between 50% and 85% of battered women reporting missing work because of the abuse.³⁰⁶ Between 24% and 52% of surveyed battered women lost their jobs, at least in part, due to the abuse.³⁰⁷ One recent study *228 indicates that reductions in economic assistance increases battered women's likelihood of being killed by their abusive partners.³⁰⁸ Sexual assault has similar effects. As Congress noted in enacting the 1994 Violence Against Women Act, nearly 50% of sexual assault victims lose their jobs in the aftermath of the crimes.³⁰⁹ An unpublished study of sexual assault survivors who sought services from a victim services agency similarly found that over 75% of employed victims lost income or had to take time off as a result of the attacks.³¹⁰ Access to compensation for the losses resulting from the abuse can make a decided difference in victims' abilities to recover.

B. Putting the Programs in Context: Examining the Persistence of Bias

The difference in public sentiment regarding the September 11 victims and victims of crimes such as domestic and sexual violence recalls other debates about “deserving” versus “undeserving” beneficiaries of public assistance.³¹¹ There was never any question that victims of the September 11 attacks were anything but “innocent” victims and therefore deserving of sympathy and support. If this were the justification for the compensation programs' structures, it should apply as well to the state victim compensation programs, which by statutory requirement authorize awards only to “innocent” victims.³¹² However, victims of other crimes, particularly those involving domestic violence, sexual assault, or other forms of bias-motivated violence, have traditionally been viewed with suspicion. For example, Professor Henry Weihofen invoked the most traditional and outdated stereotypes about rape victims in his opposition to early proposals to *229 enact victim compensation programs.³¹³ He argued that rape accusations are very frequently made by women who are caught in the act of fornication, or who are seeking compensation, marriage or revenge; and the risk of successful deception is not negligible. . . . Even the woman who is quite sane, but who is possessed of strong guilt feelings, may convince herself in retrospect that her own conduct was really blameless and that she was forced.³¹⁴

Weihofen went on to cite women's “ambivalent and confused mixture of desire and fear,” and to opine that “erotic pleasure” is intertwined with “physical struggle.”³¹⁵ He further argued that victim behavior was often a “major contributing factor” to criminal homicide as well.³¹⁶ Not surprisingly, he concluded that women provoked some of “the most famous wife-killings.”³¹⁷ Other commentators expressed similar views.³¹⁸ Early versions of VOCA reflected that same distrust. For

example, the Senate report on the 1973 version prohibited awards to “a person maintaining continuing sexual relations with a principal or accomplice.”³¹⁹

Of course, not all VOCA drafters held these views. However, bias against domestic and sexual violence victims remains, and has been widely documented. For example, in enacting the 1994 Violence Against Women Act, Congress referenced two dozen studies by state task forces concluding that crimes that disproportionately affect women “are often treated less seriously than comparable crimes affecting men.”³²⁰ Subsequent reports confirm those conclusions. The recent 2003 report of the Pennsylvania Committee on Racial and Gender Bias identified ways in which court personnel continue to treat survivors of domestic abuse in ways that were experienced as *230 “demeaning,” demonstrating a lack of understanding of the problem and failure to take it seriously.³²¹ Survivors' credibility is continually scrutinized, and their reactions to the abuses viewed with skepticism.³²² Bias against victims of sexual assault is legendary as well. From the historical view that rape “is an accusation easy to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent,”³²³ to contemporary efforts to discredit complaining witnesses,³²⁴ victims of sexual assault still experience the justice system as unwelcoming and even hostile, notwithstanding much progress and reform.³²⁵

*231 Those attitudes reflect formal and informal policies and practices that long have barred relief. For example, tort immunity doctrines and marital exemptions historically have prevented civil recovery, and their legacy continues to bar civil suits.³²⁶ Beyond these formal barriers, practices in which survivors are forced to expose their private lives and intimate conduct to win a damage award operate to deter survivors from filing suit.³²⁷ If government-supported compensation programs can be seen as a mechanism to fill gaps produced by the failure of existing systems to address victims' needs, they should go to lengths to ensure participation and adequate compensation where, as here, traditional systems fall short. Although the 9/11 Fund was devised with a different purpose, its policies and procedures, designed to ensure participation and meaningful compensation, exemplify the type of approach a victim compensation program could take.

When viewed in tandem, many of the arguments that would justify creating separate compensation systems for victims of terror attacks and victims of domestic and sexual violence lose their force. For example, an argument justifying different treatment based on the number of people affected by the September 11 attacks becomes less persuasive in light of the statistics detailing the pervasiveness of domestic and sexual violence.³²⁸ Arguments can be made that the September 11 victims suffered similar harm as a group, thereby facilitating the process of determining the compensation to which they were due.³²⁹ Yet, even if the similarity of harm experienced by victims *232 of domestic and sexual violence is put to the side, compensation programs are fully capable of assessing individualized harm. While there may be something about the uniformity of many September 11 victims' experiences that facilitates determination of award amounts, the 9/11 Fund still makes individualized assessments, for example, for losses experienced by those who were injured as a result.³³⁰ The highly public nature of the September 11 attacks and the perception of group harm contrasts sharply with the ways in which domestic and sexual violence traditionally have been relegated to the private sphere.³³¹ To the extent the response to the attacks was driven by a perception that they inflicted a public harm against Americans as a group, the failure to provide a similarly accessible compensation scheme for domestic and sexual violence victims highlights our collective failure to recognize the public and shared nature of this type of violence as well.

VI. Conclusion

The question of when and to what extent the government should participate in compensation programs for victims of violent crime is difficult, compelling, and may be driven by political realities as much as by social theory and empirical evidence. This comparison of the government-supported compensation programs for victims of the September 11 terror attacks with the programs for victims of domestic and sexual violence reveals that the distinctions between the two groups of victims is less stark than one might initially imagine, and that the wide disparity in programmatic approach is not justified by the difference in victim experience. This Article urges an invigorated review of compensation programs for victims of these forms of violence. It

recommends that future programs be informed by the realities of victims' experiences and be stripped of historic biases against survivors of domestic and sexual violence. The September 11 attacks illustrate how victim compensation programs might be approached in the absence of mistrust and bias. Extending the compassion that provided the impetus for the 9/11 Fund to victims of other crimes for whom traditional forms of recovery are unavailable can go a long way toward advancing the critical goal of helping *233 victims recover from the violence, and move on to safety and independence.

Footnotes

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- ¹ See *infra* note 185 and accompanying text.
- ² See *infra* Parts III-IV.
- ³ See, e.g., The Problems of Violence Against Women in Utah and Current Remedies: Hearing Before the Senate Committee on the Judiciary, 103d Cong. 1-2 (1993) (statement of Sen. Hatch) (describing violence against women as “epidemic” in hearing supporting federal Violence Against Women Act); UNIFEM, Not a Minute More: Violence Against Women Around the World, available at <http://www.unifem.org/campaigns/november25/issue.php> (last visited Oct. 13, 2004) (describing violence against women as “a universal problem of epidemic proportions” based on statistics showing that at least one out of every three women around the world has been beaten, coerced into sex, or otherwise abused in her lifetime, usually by someone she knows).
- ⁴ Callie Marie Renniston, U.S. Dep't of Justice, Intimate Partner Violence, 1993-2001, NCJ 197838, at 2 (Feb. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf> (last visited Oct. 13, 2004) (reporting between 1247 and 1600 murders of women by intimate partners in each year surveyed between 1976 to 2000); Callie Marie Renniston & Sarah Welchans, U.S. Dep't of Justice, Intimate Partner Violence, NCJ 178247, at 2 (May 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf> (last visited Oct. 13, 2004) (reporting that intimate partner homicides accounted for approximately 11% of all murders nationwide in 1998).
- ⁵ Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women, NCJ 183781, at 26 (Nov. 2000), available at <http://www.ncjrs.org/pdffiles1/nij/183781.pdf> (last visited Oct. 13, 2003); accord Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, Extent, Nature and Consequences of Intimate Partner Violence--Findings from the National Violence Against Women Survey, NCJ 181867, at 9 (July 2000), available at <http://www.ncjrs.org/pdffiles1/nij/181867.pdf> (last visited Oct. 13, 2004).
- ⁶ Renniston, *supra* note 4, at 1 (reporting 41,740 incidents of rape or sexual assault against women in 2001); Renniston & Welchans, *supra* note 4, at 2 (reporting 63,490 incidents of rape or sexual assault against women in 1998).
- ⁷ See *infra* Part V.A.
- ⁸ See *infra* Part IV.B.5.
- ⁹ This Article's use of this abbreviation is for convenience purposes only and should not confuse the government-sponsored 9/11 Victim Compensation Fund with the private philanthropic fund established by the United Way and New York Community Trust, which also was referred to as the “9/11 Fund.” That fund, which collected \$526 million (including interest) and distributed over \$256 million in cash assistance to victims, was comprised entirely of private philanthropic funds that provided direct assistance to victims of the attacks and also funded programs and services to facilitate their recoveries. See The September 11 Fund, Year Two 15, at http://www.september11fund.org/two_year_report.pdf (last visited Oct. 13, 2004).
- ¹⁰ Air Transportation Safety and System Stabilization Act (ATSSSA), Pub. L. No. 107-42, §§401-409, 115 Stat. 230, 237-41 (2001) (codified at 49 U.S.C.A. §40101 note (West Supp. 2004)). The response to the September 11 attacks also raises difficult questions

about the fairness inherent in providing generous government assistance for victims of those, but not other, terror attacks, as well as questions about why the government has compensated victims of terror attacks but not other misfortunes, such as noncriminal torts or natural disasters. This Article distinguishes compensation for victims of violent crimes from compensation for victims of other misfortunes on the basis that violent crimes involve acts in which the state is involved in creating a remedy, in which the loss was committed at the hand of another person, and for which the tort system tends to be unavailable. See *infra* Part IV.B.5; see also, e.g., Robert D. Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U. L. Rev. 444, 459-61 (1964) (distinguishing the goals of victim compensation programs from those addressing noncriminal injuries because the losses of those injured by noncriminal negligent acts are more likely to be covered by the tort system). But see, e.g., Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 Va. L. Rev. 1831, 1837-42 (2002) (comparing the 9/11 Fund with tort and no-fault programs); Marshall S. Shapo, *Compensation for Terrorism: What We Are Learning*, 53 DePaul L. Rev. 805, 817 (2004) (suggesting that emotional harm resulting from a terrorist act may be similar to that resulting from a car accident); Shapo, *supra*, at 809 (suggesting that terrorism lies on a continuum that includes illness and injury, natural disaster and war, and even extends to poverty-- notably, violent crimes, of which terrorism is a subset, are absent from his list).

- 11 ATSSSA §401 (stating the Act's legislative purpose as "preserv[ing] the continued viability of the United States air transportation system"); see also *infra* Part III.B (discussing the purpose of the Act).
- 12 ATSSSA §403.
- 13 *Id.* §405(c)(3)(B)(i).
- 14 See *infra* Part III.
- 15 But see *infra* note 177 (referencing arguments positing governmental responsibility for the attacks).
- 16 ATSSSA §405.
- 17 See *infra* notes 162-172 and accompanying text.
- 18 See U.S. Dep't of Justice, *Compensation for Deceased Victims: Award Payment Statistics*, available at http://www.usdoj.gov/victimcompensation/payments_deceased.html (last visited Oct. 13, 2004).
- 19 See U.S. Dep't of Justice, *Compensation for Personal Injury*, available at http://www.usdoj.gov/victimcompensation/payments_injury.html (last visited Oct. 13, 2004).
- 20 Kenneth S. Abraham & Kyle D. Logue, *The Genie and the Bottle: Collateral Sources Under the September 11th Victim Compensation Fund*, 53 DePaul L. Rev. 591, 592 (2004).
- 21 Some victim groups sued the 9/11 Fund, challenging the presumptive awards as unduly limited, although those claims have been unsuccessful. See, e.g., *Schneider v. Feinberg*, 345 F.3d 135, 143-45 (2d Cir. 2003) (per curiam) (rejecting claims by surviving spouses and personal representatives of decedents that the regulatory methods adopted by the 9/11 Fund improperly capped recovery); see also Cantor Fitzgerald L.P. et al., *Submission of Cantor Fitzgerald, L.P., Espeed, Inc. and Tradespark L.P. to the Special Master of the September 11 Victim Compensation Fund of 2001 and to the U.S. Dep't of Justice*, available at <http://news.findlaw.com/udocs/docs/cantor/cantor902smdojsuo.pdf> (last visited Oct. 13, 2004) (arguing that the 9/11 Fund's regulations violated Congress' intent to provide "full compensation" to victims).
- 22 This Article focuses on victims of domestic and sexual violence, rather than victims of all violent crime. As Parts IV.B.5 and V.B, *infra*, elaborate, victims of domestic and sexual violence, as well as victims of bias crimes, face particular barriers in obtaining redress through the criminal and civil justice systems that victims of other crimes do not necessarily encounter. The specific difficulties domestic and sexual violence victims face in accessing the tort system, the traditional venue for obtaining compensation for the financial losses that may result from criminal wrongdoing, make the availability of compensation through public programs all the more important. Although the principles identified in this paper may apply as well to other crime victims, the extent to which they apply is beyond the scope of this Article.
- 23 See *infra* Part II.B.
- 24 *Id.*

- 25 Id.
- 26 Id.
- 27 Id.
- 28 Id.
- 29 Lisa Newmark et al., Urban Inst., *The National Evaluation of State Victims of Crime Act Assistance and Compensation Programs: Trends and Strategies for the Future*, at xiv (Apr. 2003), at <http://www.urban.org/url.cfm?ID=410924> (last visited Oct. 13, 2004); see also Dan Eddy, National Association of Crime Victims Compensation Boards, *State Crime Victim Compensation Programs: Nature and Scope* 14, at <http://www.ncvc.org> (last visited Oct. 13, 2004) (citing an average award amount of \$25,000).
- 30 See 42 U.S.C. §10602(a)(3) (2000) (capping the amounts that programs receiving federal funds can use for program administration).
- 31 ATSSSA, Pub. L. No. 107-42, §405(c)(3)(B)(i), 115 Stat. 230 (2001) (codified at 49 U.S.C.A. §40101 note (West Supp. 2004)) (requiring claimants to waive their rights to sue potential tortfeasors); see also *infra* notes 152-155 and accompanying text. However, the ATSSSA permits claimants to pursue lawsuits against the terrorists whether or not they filed claims with the 9/11 Fund. 28 C.F.R. §104.21(d) (2003).
- 32 Michele Landis Dauber has demonstrated that the programmatic response to the September 11 attacks also parallels compensation programs established in the aftermath of other disasters, such as compensation programs developed to assist victims of various calamities, and to assist victims of the War of 1812. See Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation* (Stanford Law School, Public Law Working Paper, Dec. 2004), available at <http://ssrn.com/abstract=480703> (last visited Oct. 13, 2004).
- 33 See *infra* Part V.A.
- 34 Id.
- 35 Of course, the same could be said of the survivor of any circumstance involving a family member who has died. See discussion *supra* note 10 (distinguishing the groups of victims addressed in this Article from victims of other misfortunes).
- 36 See *infra* Part IV.B.
- 37 See *infra* Part V.B.
- 38 See *infra* Part V.A.
- 39 Some proposals have been introduced concerning compensation programs for victims of future terrorist attacks. See, e.g., Benefits for Victims of International Terrorism Act of 2003, S. 1275, 108th Cong. §7 (2003) (proposing awarding death benefits commensurate to those paid under the Public Safety Officers' Benefits Program to the surviving families of those killed in future terrorist attacks and authorizing payments of up to those amounts to those injured as a result); see also Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DePaul L. Rev. 627, 658-60 (2004) (proposing a government-provided insurance program that would be based on need, not loss); Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism--and Crime* (Michigan Law and Economics Research Paper No. 03-005, U. of Chicago, Public Law Working Paper No. 47, U. Chicago Law & Econ., Olin Working Paper 189, May 2003), available at <http://ssrn.com/abstract=414144> (last visited Oct. 13, 2004) (proposing experimentation with crime insurance to address needs that arise from future acts of terrorism); Anne Gron & Alan O. Sykes, *Terrorism and Insurance Markets: A Role for the Government as Insurer?*, 36 Ind. L. Rev. 447, 448 (2003) (arguing against government involvement in insurance markets for terrorism insurance). None of these proposals addresses the similarities between the predicaments facing victims of terrorism and victims of domestic and sexual violence or other violent crimes. Nor do they address the inconsistencies that might arise by virtue of establishing separate and unequal systems for these two groups of victims. See *infra* Part V.
- 40 Professor Stephen Schafer, one of the leading proponents of restitution and crime victim compensation programs, has described the difference in that compensation is a civil, social welfare program reflecting a responsibility for the victim assumed by society while restitution is penal in nature and allocates responsibility to the offender. Stephen Schafer, *Victim Compensation and Responsibility*, 43 S. Cal. L. Rev. 55, 65 (1970).

- 41 The familiar notion of “an eye for an eye,” dating back to the Code of Hammurabi in the eighteenth century B.C., is perhaps one of the earliest references to payments to victims as a form of punishment. Office for Victims of Crime, U.S. Dep’t of Justice, New Directions from the Field: Victims’ Rights and Services for the 21st Century: Restitution, NCJ 170600, at 355 (1998) [hereinafter OVC Restitution], available at [http:// www.ojp.usdoj.gov/ovc/new/directions/welcome.html](http://www.ojp.usdoj.gov/ovc/new/directions/welcome.html) (last visited Oct. 13, 2003); see also, e.g., L.T. Hobhouse, Law and Justice, in *Considering the Victim* 5 (Joe Hudson & Burt Galaway eds., 1975) (detailing the history of restitution); Richard E. Laster, Criminal Restitution: A Survey of its Past History, in *Considering the Victim*, supra, at 19, 19-22 (same); Schafer, supra note 40, at 55-56 (discussing the historical origins of compensation and restitution); Childres, supra note 10, at 444-55 (same). Historians have documented the evolution of criminal punishment from schemes in which individuals had license to take the law into their own hands and exact punishment on their own terms, to systems of “composition,” in which payment to the victim was introduced as a means to settle accounts between victims and perpetrators following a crime. See Hobhouse, supra, at 5-7; Leonard McGee, Crime Victim Compensation, 5 J. Contemp. L. 67, 68 (1978) (tracing the origins of compensation as a means of restoring a productive person to society and promoting productivity, rather than revenge); Stephen Schafer, *Compensation and Restitution to Victims of Crime* 3-7 (2d ed. 1970). The system of composition was dependent on victim approval of the amount of compensation, which varied according to the nature of the crime, and the age, rank, sex, and prestige of the injured party. Schafer, supra, at 6.
- 42 Schafer, supra note 41, at 139-41. The implications of separating the civil and criminal justice systems have been widely debated. On the one hand, separating the two processes leaves the victim with the difficulties of attempting to recover through the civil justice system. On the other hand, the concern that the victim should not have an interest in the criminal justice process counseled separating the two systems. See id. at 11-12; McGee, supra note 41, at 68; Childres, supra note 10, at 445; Laster, supra note 41, at 24; Schafer supra note 40, at 56.
- 43 Stephen Schafer, Restitution to Victims of Crime--An Old Correctional Aim Modernized, 50 Minn. L. Rev. 243, 248 (1965-66).
- 44 Id.
- 45 OVC Restitution, supra note 41, at 355.
- 46 Id.
- 47 Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§1512-1515, 3663-3664 (2000) and Fed. R. Crim. P. 32(c)(2)).
- 48 Victim and Witness Protection Act of 1982, §5(a), 96 Stat. at 1253.
- 49 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §40113, 108 Stat. 1796, 1904 (codified as amended at 18 U.S.C. §2248).
- 50 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §204, 110 Stat. 1214, 1227 (codified as amended at 18 U.S.C. §3663(A)).
- 51 18 U.S.C. §3664(m), (o).
- 52 OVC Restitution, supra note 41, at 356. For example, states vary with respect to whether restitution is mandated in all cases, only in cases involving violent crime, or only in cases involving property crime. Id. at 356-57. States also vary with respect to the range of people who can seek restitution: in some states family members, victims’ estates, private entities, victim service agencies, and others can seek assistance as well as the victim. Id. at 357.
- 53 Id. A 1996 study reported that less than one-half of 1300 crime victims surveyed were awarded restitution. Office for Victims of Crime, U.S. Dep’t of Justice, Ordering Restitution to the Crime Victim: Legal Series #6, at 4, at [http:// www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin6/ncj189189.pdf](http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin6/ncj189189.pdf) (last visited Oct. 13, 2004) [hereinafter OVC Legal Series] (citing David Beatty, Susan Hawley & Dean Kilpatrick, Statutory and Constitutional Protections for Victims Rights, National Center for Victims of Crime 39 tbl. C-8); see also, e.g., Robert C. Davis, Frances Kunreuther & Elizabeth Connick, Expanding the Victim’s Role in the Criminal Court Dispositional Process: The Results of an Experiment, 75 J. Crim. L. & Criminology 491, 499 (1984) (finding that 84% of victims who had incurred property loss or medical expenses as a result of crime were not awarded restitution); Office for Victims of Crime, U.S. Dep’t of Justice, 2002 National Victim Assistance Academy Textbook: Financial Assistance for Victims of Crime (2002)

(reporting studies finding between 54% and 81% of total restitution ordered was paid by offenders), at http://www.ojp.usdoj.gov/ovc/assist/nvaa2002/chapter5_2.html (last visited Oct. 13, 2004).

- 54 OVC Restitution, *supra* note 41, at 357; accord Barbara E. Smith, Robert C. Davis & Susan W. Willenbrand, Am. Bar Ass'n, Improving Enforcement of Court-Ordered Restitution 27 (Aug. 1989) (on file with author) (stating that nearly 50% of crime victims participating in selected restitution programs reported that award did not cover losses); Davis, Kunreuther & Connick, *supra* note 53, at 499 (finding that failure to obtain restitution was the second most commonly cited reason for victim dissatisfaction with case outcomes in criminal court).
- 55 Restitution can be awarded in cases that result in a plea agreement as well. OVC Legal Series, *supra* note 53, at 2.
- 56 Only about half of female victims of intimate violence reported the incident to law enforcement. Lawrence A. Greenfeld et al., U.S. Dep't of Justice, Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends, NCJ 167237, at 17 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf> (last visited Oct. 13, 2004). Approximately one in three offenders identified by the victim were eventually arrested or charged for the victimization. *Id.* at 20.
- 57 See, e.g., *United States v. Fountain*, 768 F.2d 790, 802 (7th Cir. 1985) (Posner, J.) (prohibiting lost future earnings in a criminal sentence of restitution if the amount of those earnings is in question); see also *United States v. Bengamina*, 699 F. Supp. 214, 218-19 (W.D. Mo. 1988) (following Posner's rationale but acknowledging that future earnings may be an appropriate component of restitution under certain circumstances). However, some states authorize restitution payments that include future damages. OVC Restitution, *supra* note 41, at 369 (citing Iowa and Arizona as states in which restitution can include payment for future losses).
- 58 See OVC Restitution, *supra* note 41, at 357; McGee, *supra* note 41, at 68. Defendants who are incarcerated necessarily will be unable to pay due to their absences from the workforce. See LeRoy L. Lamborn, The Propriety of Governmental Compensation of Victims of Crime, 41 Geo. Wash. L. Rev. 446, 451-53 (1973); see also David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 Pepp. L. Rev. 35, 42 (1989) (noting the high percentage of indigent defendants as a drawback to one use of restitution); Charlene L. Smith, Victim Compensation: Hard Questions and Suggested Remedies, 17 Rutgers L.J. 51, 58-59 (1985) (same); Marvin E. Wolfgang, Victim Compensation in Crimes of Personal Violence, 50 Minn. L. Rev. 223, 240 (1965-66) (arguing that the general inability of offenders to make restitution supports government funding of compensation programs); Kathleen V. Duffield, Note, Compensating Victims of Crime: Evolving Concept or Dying Theory?, 82 W. Va. L. Rev. 89, 92-93 (1979) (citing offender insolvency as a reason for the inadequate results achieved by victim compensation programs).
- 59 For example, studies show that persons with a household income under \$50,000 were more likely than those in higher income households to experience sexual assault. U.S. Dep't of Justice, Victim Characteristics, available at http://www.ojp.usdoj.gov/bjs/cvict_v.htm#income (last visited Oct. 13, 2004). Similarly, women with lower incomes have been shown to experience higher rates of domestic violence, although both domestic violence and sexual assault occur across all class lines. Renniston, *supra* note 4, at 4; accord Nat'l Inst. of Justice, U.S. Dep't of Justice, Research in Brief: When Violence Hits Home: How Economics and Neighborhood Play a Role 1 (Sept. 2004), available at <http://www.ncjrs.org/pdffiles1/nij/205004.pdf> (last visited Nov. 17, 2004) (concluding that intimate violence is more prevalent and more severe in economically disadvantaged neighborhoods).
- 60 Nat'l Inst. of Justice, U.S. Dep't of Justice, Compensating Crime Victims: A Summary of Policies and Practices 37 (1992) (on file with author).
- 61 Lamborn, *supra* note 58, at 448-49.
- 62 Margery Fry, Justice for Victims, 8 J. Pub. L. 191, 191-92 (1959). As one glaring example, Fry discussed a case in which court-ordered restitution would take 442 years to compensate fully a victim for the losses incurred. *Id.* at 192.
- 63 *Id.*
- 64 McGee, *supra* note 41, at 69; Lamborn, *supra* note 58, at 448-49. See generally Home Office, Compensation for Victims of Crimes of Violence (June 1961) [hereinafter White Paper] (on file with author).
- 65 See Schafer, *supra* note 41, at 139. The New Zealand program was enacted through the "Criminal Injuries Compensation Act," which came into force on January 1, 1964. *Id.*

- 66 Kent M. Weeks, The New Zealand Criminal Injuries Compensation Scheme, 43 S. Cal. L. Rev. 107, 110-11 (1970). The enumerated crimes included violent offenses, ranging from kidnapping to completed or attempted rape, but excluded compensation for damage to personal property. *Id.*
- 67 Schafer, *supra* note 41, at 141.
- 68 Britain's program became effective on August 1, 1964. McGee, *supra* note 41, at 69. Though there was public agitation for a program in England before any such public support existed in New Zealand, New Zealand adopted its program before Britain. See Ralph W. Yarborough, The Battle for a Federal Violent Crimes Compensation Act: The Genesis of S. 9, 43 S. Cal. L. Rev. 93, 96 (1970). New Zealand advocated for a compensation program primarily to stifle opposition to penal reform, which had outraged the citizenry for its alleged generosity toward criminals. *Id.*
- 69 Schafer, *supra* note 41, at 139, 144.
- 70 *Id.* at 144.
- 71 *Id.*
- 72 *Id.* at 144-45.
- 73 *Id.*
- 74 See Lynne N. Henderson, The Wrongs of Victim's Rights, 37 Stan. L. Rev. 937, 944 (1985) (describing the development of victim compensation programs in the context of the victim's rights movement).
- 75 Cal. Gov't Code §§13950-74 (Deering Supp. 2004); McGee, *supra* note 41, at 69.
- 76 Office for Victims of Crime, U.S. Dep't of Justice, New Directions from the Field: Victims' Rights and Services for the 21st Century: Crime Victim Compensation, NCJ 170600, at 325 (1998) [hereinafter OVC Victim Compensation], available at <http://www.ojp.usdoj.gov/ovc/new/directions/pdf/txt/chap14.pdf>. (last visited Oct. 13, 2004); Smith, *supra* note 58, at 52-56 (recounting program scope and requirements as of the mid-1980s).
- 77 Funding originally was made available through the Law Enforcement Assistance Administration of the Department of Justice, which was terminated in the 1980s. Robert L. Rabin, The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?, 53 DePaul L. Rev. 769, 796 (2003).
- 78 Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (codified as amended at 42 U.S.C. §§10601-10605 (2000)).
- 79 The legislation that ultimately was enacted as the 1984 VOCA initially was introduced in 1973. S. Rep. No. 93-83, at 2 (1973). A previous crime victim compensation statute had been introduced by Senator Yarborough in 1965. See Ralph W. Yarborough, S. 2155 of the Eighty-Ninth Congress--The Criminal Injuries Compensation Act, 50 Minn. L. Rev. 255, 255 (1965-66). Senator Yarborough modeled his programs on those enacted in Great Britain and New Zealand. *Id.* His bill would have provided compensation only for victims of crimes that arose in the limited arena of federal criminal jurisdiction, based on the theory that state compensation was warranted only where the state failed to protect the victim from the crime. *Id.* at 258. As a result, it could apply only where there was an existing general federal police responsibility. *Id.* The scheme would have provided compensation for physical injury (not property damage) upon a finding that the injury or death resulted from a criminal act. *Id.* at 263. The proposed legislation would have permitted damages awards that took into account future losses, and would have authorized the fact-finding commission to look at all factors, including other sources of recovery, in determining the proper award, although it set a maximum recovery at \$25,000. *Id.* at 263-64.
- 80 S. Rep. No. 93-83, at 2. The initial criteria resembled the current federal criteria in requiring prompt reporting to law enforcement and precluding awards to those whose own conduct was a substantial contributing factor in the crime. *Id.* at 6. The initial proposal also established a requirement that victims prove financial need. While explicitly deemed not to be a "means test," the legislation employed a concept of "financial stress" so that the resources of the program would be concentrated in the area of greatest need. *Id.* at 5.
- 81 *Id.* at 5, 12. Survivors of victims killed as a result of the crime would also be eligible for reasonable burial expenses and loss of support. *Id.*

- 82 Id. at 5.
- 83 Id. This remained a central tenet throughout the VOCA Fund's legislative history. A provision establishing the program's right to recover from the perpetrator was contained in the 1973 bill. Id. at 19 (discussing section 457 of the 1973 bill, which grants the attorney general the right to institute an action against any person whose actions gave rise to the claim for compensation). The 1976 bill explicitly provided that the amount of any state award would be reduced by any amount the claimant recovered from another source, to establish the program as the payor of last resort and prevent double recovery. [H.R. Rep. No. 94-1550, at 10-11 \(1976\)](#). This provision stayed in the bill in various forms. See, e.g., [H.R. Rep. No. 95-337, at 3, 8 \(1977\)](#); [S. Rep. No. 95-963, at 8-9, 16 \(1978\)](#); [H.R. Rep. No. 95-1762, at 4, 12 \(1978\)](#); [H.R. Rep. No. 96-753, at 8 \(1980\)](#).
- 84 The legislative history reflects supporters' intent to exclude those who contributed to the commission of the crime. See, e.g., [H.R. Rep. No. 96-753, at 3, 6 \(1980\)](#) (reflecting the intention to exclude those who contributed to the crime by being accomplices or bearing some responsibility for the criminal act); [H.R. Rep. No. 95-337, at 2, 27 \(1977\)](#) (same); [S. Rep. No. 93-83, at 4 \(1973\)](#) (expressing concern for the lack of support extended to the "innocent victim" as compared with the protections offered criminal offenders). However, the term "innocent victim" has been interpreted to preclude recovery to a much wider group of individuals. See *infra* notes 116, 132 and accompanying text.
- 85 This provision also has characterized VOCA since its earliest drafts. See, e.g., [S. Rep. No. 93-83, at 17](#) (requiring the claimant to have "substantially cooperated" with law enforcement in VOCA of 1973); [H.R. Rep. No. 94-1550, at 9](#) (requiring "cooperation" in VOCA of 1976); [H. R. Rep. No. 95-337, at 6-7](#) (VOCA of 1977); [S. Rep. No. 95-963, at 7](#) (VOCA of 1978); [H.R. Rep. No. 95-1762, at 3, 8 \(1978\)](#) (noting that the Conference Report's decision to require cooperation, rather than exclude awards for which no cooperation was proved, was an enforcing requirement that would ease administrative burden).
- 86 [S. Rep. No. 93-83, at 16 \(1973\)](#); [H.R. Rep. No. 96-753, at 8](#) (requiring claimants to report the crimes to law enforcement within seventy-two hours absent proof of "good cause" in VOCA of 1979).
- 87 [H.R. Rep. No. 94-1550, at 5](#); see also *infra* Part IV.B.1.
- 88 [H.R. Rep. No. 94-1550, at 5](#).
- 89 Id. at 5-6; see also [S. Rep. No. 95-963, at 13](#) (letter of then-Assistant Attorney General Patricia M. Wald) (supporting the victim compensation program (1)to spread the costs of crime; (2)to demonstrate that government's concern with crime extends beyond detection, prosecution, and conviction in order to improve the public's attitude to the criminal justice system and improve quality of urban life; and (3)to encourage citizens to report offenses to law enforcement); *infra* Part IV.B.3 (discussing victim compensation as an aid to the criminal justice system).
- 90 [H.R. Rep. No. 94-1550, at 6](#).
- 91 President's Task Force on Victims of Crime, Final Report (Dec. 1982) [hereinafter Final Report].
- 92 The Final Report issued a comprehensive series of recommendations, addressing federal and state governmental initiatives, including: recommendations for criminal justice system agencies; recommendations for organizations such as hospitals, ministries, the bar, and schools; recommendations for the mental health community and the private sector; and a constitutional amendment enhancing crime victims' rights. Id. at v.
- 93 Id. at 37. The Task Force recognized the importance of financial assistance to victims' abilities to recover from the crime, and recognized the limits of restitution as a source for funding those programs. It resolved what it saw as the two fundamental issues surrounding providing federal funding for victim compensation: first, with respect to the propriety of federal involvement and cost, the Task Force concluded that federal involvement was appropriate to assist the state programs that compensate federal crime victims without invoking an entirely new bureaucratic mechanism; and second, to supplement the federal assistance already provided to state criminal justice systems in the form of grants to prisons and by recommending a funding scheme that relied primarily on criminal fines, penalties, and forfeitures. Id. at 44.
- 94 Id.
- 95 See [S. Rep. No. 98-497, at 1-3 \(1984\)](#).

- 96 Id. at 13-14.
- 97 Id. at 5.
- 98 Id. at 4; see *infra* Parts IV.B.2-3.
- 99 S. Rep. No. 98-497, at 1-3.
- 100 As the Senate Judiciary Committee Report recommending enactment of the bill stated: "While the bill would authorize new spending, the increased fines, improved collections, penalty assessment fees, and public donations could conceivably offset much of that spending authority." Id. at 21.
- 101 OVC Victim Compensation, *supra* note 76, at 1; Nat'l Ass'n of Crime Victim Comp. Bds., Crime Victim Compensation: An Overview, available at www.nacvcb.org/articles/Overview_prn.html (last visited Oct. 13, 2004).
- 102 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §233(a), 110 Stat. 1214, 1244 (1996) (codified as amended at 42 U.S.C. §10602(d)(3) (2000)).
- 103 Eddy, *supra* note 29, at 16-17. As of September 30, 2003, the New York Crime Victims Board had provided \$44 million in compensation to New York victims of the attacks, for expenses incurred from emergency assistance, to funeral expenses, loss of earnings/support, and medical expenses. E-mail from Sue Malatesta, N.Y. State Crime Victims Bd., to Heather Pratt, Research Assistant (Nov. 6, 2003) (on file with author). In addition to the New York program, state victim compensation programs in Virginia, Pennsylvania, and California, as well as programs in Massachusetts, New Jersey, Connecticut, and Rhode Island, have helped victims of the attacks since the immediately following days. Nat'l Ass'n of Crime Victim Comp. Bds., September 11 Compensation Information, available at <http://www.nacvcb.org/September11info.html> (last visited Oct. 13, 2004).
- 104 42 U.S.C.A. §10602(a)-(b)(6) (West 1995 & Supp. 2004). To be eligible for VOCA compensation program funding, programs must: (1)include victims of drunk driving and domestic violence among eligible recipients; (2)promote victim cooperation with law enforcement authorities; (3)certify that VOCA grants will not be used to supplant state funds otherwise available to provide crime victim compensation; (4)make compensation awards to victims who are nonresidents of the state on the same basis as it would to residents; (5)provide compensation to victims of federal crimes; (6)provide compensation to residents of the state who are victims of compensable crimes; (7)"not, except pursuant to rules issued by the program to prevent unjust enrichment of the offender, deny compensation to any victim because of that victim's familial relationship to the offender, or because" she is related to, or cohabitates with, the offender; (8)not provide compensation to any person who has been convicted of an offense under Federal law with respect to any time period during which the person is delinquent in paying a fine, other monetary penalty, or restitution imposed for the offense; and (9)comply with VOCA administrative program requirements. *Id.* §10602(b).
- 105 Id. §10603.
- 106 Id. §10601(b).
- 107 Eddy, *supra* note 29, at 3.
- 108 Id.
- 109 See Lisa Newmark et al., Urban Institute, The National Evaluation of State Victims of Crime Act Compensation and Assistance Programs: Findings and Recommendations from a National Survey of State Administrators 2 (2001) (on file with author) (charting the fluctuation in amounts deposited into VOCA funds due to variations in prosecution and collection of penalties). Amounts available for victim compensation and assistance programs vary as well due to caps imposed by Congress on the amounts of monies in the fund that would be released to the states. *Id.* Funding for victim compensation programs also may be diminished by accountability problems that may prevent funds earmarked for crime victim programs to be diverted to other uses. See, e.g., Gary Hendricks, Legislators Begin Quest to Track Crime Victims' Cut of Fine Money, *Atlanta J. Const.*, Oct. 9, 2003, at C1 (reporting on hearings to account for criminal fines earmarked for domestic violence services).
- 110 Office of Justice Programs, U.S. Dep't of Justice, 2001 Victims of Crime Act of 1984 Performance Report, State Compensation Program (2002) [hereinafter OJP 2001 Performance Report], available at http://www.ojp.usdoj.gov/ovc/fund/vocanpr_vc01.html (last visited Oct. 13, 2004). Of these expenses, medical and dental represented the largest category (\$165,927,741), followed by lost

wages and loss of support (\$73,530,472), mental health expenses (\$55,402,219), funeral and burial expenses (\$40,292,775), forensic sexual assault exams (\$8,556,366), crime scene cleanup (\$104,209), and other expenses (\$23,115,147). *Id.*

- 111 *Id.* Domestic violence claims totaled 32,093 of a total of 146,156 listed claims, while child abuse victims represented 33,162, and sexual assault represented 10,937 of those claims. *Id.* Sexual assault and domestic violence together represent nearly 30% of all cases. *Id.* Reports indicate that in 2002, domestic violence victims alone represented 35% of all claims. Nat'l Ass'n of Crime Victim Comp. Bds., Compensation to Victims AGAIN at Record Highs ..., at <http://www.nacvcb.org> (last visited Oct. 13, 2004).
- 112 OJP 2001 Performance Report, *supra* note 110.
- 113 See *infra* Part IV.B.5.
- 114 See, e.g., Nat'l Inst. of Justice, *Compensating Victims of Crime: An Analysis of American Programs* 86 (1983) [hereinafter, *NIJ Compensation Analysis*] (on file with author) (noting the limited scope of compensation programs despite the “magnanimous intent” underlying their enactments). The legislative history reveals the limited vision that accompanied the programs' enactment. For example, the 1979 House Report projected that the federal support contemplated by the bill would allow the then-existing state programs to increase their reaches, which would still extend only to 1.6 to 1.7% of crime victims. *H.R. Rep. No. 96-753*, at 13 (1980).
- 115 *NIJ Compensation Analysis*, *supra* note 114, at 86-87.
- 116 42 U.S.C. §10602(b)(2) (2000) (requiring programs to promote cooperation with law enforcement); *id.* §10602(b)(8) (prohibiting payments to those who had been convicted of a federal criminal offense). The drafters deliberately distinguished the crime victim compensation program, which would assist “innocent” victims, from beneficiaries of public assistance. *H.R. Rep. No. 94-1550*, at 4 (1976). For example, the 1976 House Report emphasized its concern with guarding against unwarranted payments. *Id.* It quoted testimony of the Executive Secretary of the New Jersey Violent Crimes Compensation Board, who described program requirements that require staff to “verify his innocence” before issuing awards because “[w]e have no intention of creating another welfare give-away program or anything like that.” *Id.* at 4 n.8; see also *infra* notes 132-135 and accompanying text (discussing “innocent” victim requirement in state compensation programs).
- 117 OJP Victim Compensation, *supra* note 76, at 329; see also *infra* notes 136-139 and accompanying text (discussing program eligibility requirements as barriers to recovery).
- 118 42 U.S.C. §10602(a)(3).
- 119 Presumably, this requirement was incorporated to ensure that victims actually benefited from the programs. While a laudable goal, one wonders whether this limitation hampers the development of infrastructure that could address programmatic limitations. For example, programs have been criticized for the length of time it takes for claims to be processed, which can take up to six months. Lisa Newmark, *Crime Victims Compensation Programs Needs Assessed*, 250 Nat'l Inst. of Just. J. 45 (2003) (on file with author).
- 120 See *supra* note 29 and accompanying text.
- 121 See *supra* note 29 and accompanying text.
- 122 Newmark et al., *supra* note 109, at 6.
- 123 OVC Victim Compensation, *supra* note 76, at 330; 42 U.S.C. §10602(e).
- 124 OVC Victim Compensation, *supra* note 76, at 326. These requirements stemmed from the reasonable concern that awarding benefits to family members of the offender could inadvertently benefit the offender.
- 125 Anti-Drug Abuse Act of 1988, *Pub. L. No. 100-690*, §7125(c)(1), 102 Stat. 4181, 4422 (1988) (amending 42 U.S.C. §10602(b)). VOCA similarly was amended to allow victims of drunken driving to receive compensation funds. *Id.*
- 126 In 1996, the National Association of Crime Victim Compensation Boards (NACVCB) recommended standards to enhance program operations in four areas identified as critical to program success, one of which was outreach, training, and communication to recruit eligible claimants. Newmark et al., *supra* note 29, at xiv. In the most recent evaluation of compensation programs, the “vast majority” of program administrators reported that they perceived that they received too few claims. Newmark et al., *supra* note 109, at 15. The report concluded that there is a “widespread perception” among program administrators that many potentially eligible claimants

do not access program benefits. *Id.* Consequently, the report recommended additional outreach activities, particularly those directed to population groups including non-English-speaking communities. *Id.*; see also, e.g., Newmark et al., *supra* note 29, at xvi-xvii (detailing the importance of outreach); OVC Victim Compensation, *supra* note 76, at 343-44; Newmark, *supra* note 119, at 45 (recommending better publicity for compensation programs).

- 127 Newmark et al., *supra* note 109, at 20 (citing Dale Parent, Barbara Auerbach & Kenneth Carlson, Nat'l Inst. of Justice, U.S. Dep't of Justice, *Compensating Crime Victims: A Summary of Policies and Practices* 16-17 (1992)).
- 128 *Id.* at 21. A similar study performed two years later reached the same conclusion. Newmark et al., *supra* note 29, at xvii. Studies have not estimated the percentage of individuals in each category that do not file claims.
- 129 Newmark et al., *supra* note 29, at xvii. Another recent report found that 80% of crime victims who incurred expenses as a result were not even aware of crime victim compensation programs. Ellen Brickman et al., National Institute of Justice, *Victim Needs and Victim Assistance* 148 (2003) (manuscript on file with author).
- 130 Newmark et al., *supra* note 29, at xviii. Although \$600 may not appear to be a substantial amount, it could well be to the individual potential claimant. Another recent study similarly concluded that few of victims' postcrime expenses were reimbursed. Brickman, *supra* note 129, at 148.
- 131 Newmark et al., *supra* note 29, at xv.
- 132 Ten states currently have "felony exclusion" provisions. See [Ark. Code Ann. §16-90-712\(5\)](#) (Michie 2003); [Cal. Gov't Code §13956\(d\)\(1\)-\(3\)](#) (Deering 2004); [Fla. Stat. Ann. §960.065\(1\)\(d\)-\(e\)](#) (West 2001); [Ga. Code Ann. §17-15-7\(h\)](#) (1997); [Miss. Code Ann. §99-41-17\(1\)\(i\)](#) (2000); [Mo. Ann. Stat. §595.020\(4\)](#) (West 2003); N.C. Gen. Stat. Ann. §15-B-11(c1) (2003); [Ohio Rev. Code Ann. §2743.60\(E\)\(1\)-\(2\), \(F\)\(1\)-\(2\)](#) (West 2004); [R.I. Gen. Laws §12-25-19\(d\)\(1\)\(ii\)-\(iii\)](#) (2002); [Wyo. Stat. Ann. §1-40-106\(c\)](#) (Michie 2003). Of these, several preclude a crime victim from receiving compensation even if the felony was unrelated to the event that gave rise to the compensation claim. See, e.g., [Cal. Gov't Code §§13956\(d\)\(1\)-\(3\)](#); [Ga. Code Ann. §17-15-7\(h\)](#); [Miss. Code Ann. §99-41-17\(1\)\(i\)](#); [Ohio Rev. Code Ann. §2743.60\(E\)\(1\)-\(2\), \(F\)\(1\)-\(2\)](#); [Wyo. Stat. Ann. §1-40-106\(c\)](#); see also OVC Victim Compensation, *supra* note 76, at 330 (discussing eligibility requirements of most state programs).
- 133 See, e.g., [Ferguson v. Ohio Victims of Crimes Div.](#), No. 02AP-299, 2002 WL 1937820, at *2 (Ohio Ct. App. 2002) (denying a compensation award to a crime victim who ran from an officer who attempted to arrest him for traffic violations). Ironically, a claimant convicted of a felony after she was the victim of a compensable crime may be eligible for compensation. See [In re Butera](#), 620 N.E.2d 312, 313 (Ohio Ct. Cl. 1993). Debate preceding VOCA's announcement suggests that distrust of victims may have played a part in the legislation's requirements. See, e.g., Robert Childres, *Compensation for Criminally Inflicted Personal Injury*, 50 Minn. L. Rev. 271, 273-74 (1966) (suggesting that the federal victim compensation program exclude cases where the victim directly or indirectly contributed to the crime as a means of ensuring that "culpable" victims such as "women yearning for rape" do not receive compensation); see also *infra* Part V.B.
- 134 Eight states currently may exclude victims from compensation if they do not meet "financial hardship" requirements. See [Fla. Stat. Ann. §960.13\(8\)](#) (West 2001); [Kan. Stat. Ann. §74-7305\(d\)](#) (2002); [Ky. Rev. Stat. Ann. §346.140\(3\)](#) (Banks-Baldwin 2003); [Mich. Comp. Laws Ann. §18.361\(7\)](#) (West 2001); [Neb. Rev. Stat. §81-1822\(5\)](#) (2002); Nev. Rev. Stat. Ann. 217.108 (Michie 2001); [N.Y. Exec. Law §631\(6\)\(a\)](#) (McKinney 2004); [Wyo. Stat. Ann. §1-40-110\(b\)\(ii\), \(d\)](#). This requirement had its roots in the early drafts of the bill, which required that a victim's compensation (or that of his or her surviving dependent(s)) be withheld until the victim exhausted his liquid assets. [S. Rep. No. 93-83](#), at 15 (1973). In 1978, Congress debated whether to allow or require states to condition awards on a showing of means. See, e.g., [H.R. Rep. No. 95-1762](#), at 10-11 (1978) (rejecting the proposed Senate amendment that would prohibit means testing); [S. Rep. No. 95-963](#), at 7 (1978) (prohibiting means tests). Ultimately, the Conference Report adopted a compromise under which states would be permitted to adopt means tests and the Attorney General would study the impact of such tests to assess its future desirability. [H.R. Rep. No. 95-1762](#), at 11 (1978). Although some states retaining financial eligibility requirements claim not to enforce this programmatic requirement, its presence in the statutory scheme leaves applicants vulnerable to rejection, particularly during periods of limited financial resources.
- 135 See, e.g., [Lynch v. Crime Victim Comp. Bd.](#), 748 S.W.2d 160, 162 (Ky. Ct. App. 1988) (denying compensation to an infant whose mother was killed during a robbery, given his access to social security and insurance payments, despite evidence that those resources were inadequate to pay ordinary daily living expenses); [Regan v. Crime Victims Comp. Bd.](#), 441 N.E.2d 1070, 1073 (N.Y. 1982)

(denying compensation for lost wages to a mugging victim due to evidence that he had substantial savings and an interest in real property).

136 OVC Victim Compensation, *supra* note 76, at 329-30. For example, in *Allen v. State*, a shooting victim was denied compensation for medical expenses and a month of lost work resulting from the shooting when he stated that he didn't know who shot him, but the officer would not accept that answer. 48 Ill. Ct. Cl. 647, 674 (1995). To appease the officer, the claimant told him that "while he was standing at a bus stop, two white men jumped out of some bushes, robbed him and shot him." *Id.* These "different versions" of the incident that gave rise to the injuries precluded the claimant's recovery. *Id.*; accord *In re Johnson*, 52 Ill. Ct. Cl. 636, 636, 638 (2000) (denying compensation to a shooting victim who maintained that he was unable to identify his assailant for failing to cooperate). But see, e.g., *Ellis v. Crime Victims Comp. Comm'n*, 432 S.E.2d 160, 165 (N.C. Ct. App. 1993) (finding that a domestic violence victim's refusal to prosecute did not constitute "failure to prosecute" that would warrant denying compensation); *In re Smith*, 698 N.E.2d 131, 132 (Ohio Ct. Cl. 1997) (finding that a victim's signing a dismissal of charges against the offender did not constitute failure to cooperate with prosecution).

137 Only about half of all incidents of domestic violence are reported to the police. Greenfeld et al., *supra* note 56, at 19. The reasons victims do not report the incident include the belief that it is a personal matter, the belief that the police will do nothing, and the fear of offender retaliation. *Id.* For women of color, experience with and perceptions of law enforcement's bias increase victims' reluctance generally to participate in the criminal justice process. See, e.g., Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Women's Syndrome*, 1995 Wis. L. Rev. 1003, 1023 (explaining battered African-American women's reluctance to engage with the police); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1257 (1993) (describing women of color's reluctance to subject their private lives to the scrutiny of a frequently hostile police force); Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 Signs 1133, 1136-37 (2000) (warning that aggressive policing tactics "result in increased use of force, mass incarceration and brutality," and threaten safety in communities of color); Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 Am. U. J. Gender Soc. Pol'y & L. 427, 431-32 (2003) (recognizing violence by law enforcement personnel and policies that led to higher incarceration rates for defendants of color than similarly situated whites contribute to victims' reluctance to engage with the law enforcement system); Jenny Rivera, *Intimate Partner Violence Strategies: Models for Community Participation*, 50 Me. L. Rev. 283, 294-305 (1998) (exploring alternative approaches to legislative and policy directives concerning violence against women that integrate communities of color). See generally Ms. Found. for Women, *Safety & Justice for All: Examining the Relationship Between the Women's Anti-Violence Movement and the Criminal Legal System* 1-2 (2003), at http://www.ms.foundation.org/user-assets/PDF/Program/safety_justice.pdf (last visited Oct. 13, 2004) (critiquing over-reliance on the criminal justice system, particularly in light of disproportionate impact of aggressive policing practices on communities of color, while recognizing the value of the criminal justice system in saving battered women's lives). Immigrant victims of crime in general, and domestic violence in particular, face fear of repercussions resulting from reporting crimes against them to the police. *Id.* at 14. Provisions enacted as part of the 1994 Violence Against Women Act that allow battered immigrant women to self-petition for permanent residency without having to rely on their batterers for their documentation recognized the particular vulnerability of these women to law enforcement action. See 8 U.S.C. §1154(a)(1) (2000) (regarding self-petitioning); 8 U.S.C. §1254(a) (regarding suspension of deportation).

138 For example, in *In re Mandley*, an assault victim was denied compensation for "failing to cooperate" with law enforcement after she was unable to attend a second court appearance due to the fact that she ran her own child care business and could not afford to close it again. 47 Ill. Ct. Cl. 613, 614 (1995). Ms. Mandley was coping with domestic violence and had to go to the doctor and therapy several times a week. *Id.* Even though those needs were unrelated to the attack for which she was seeking compensation, her case illustrates the strain "full cooperation" puts on crime victims, particularly those facing multiple challenges in their lives. *Id.* at 615.

139 For example, in *Doe v. Fischetti*, a rape victim who did not report the rape until three years after the crime was denied compensation despite her testimony and the testimony of a witness whom she had told about the rape. 676 N.Y.S.2d 262, 263 (N.Y. App. Div. 1998). See generally Office for Victims of Crime, U.S. Dep't of Justice, *Victims' Rights and Services for the 21st Century: New Directions from the Field* Mental Health Community 219, at <http://www.ojp.usdoj.gov/ovc/new/directions/pdf/bulletins/bltn9.pdf> (last visited Oct. 13, 2004) (documenting the mental health impact of violent crime, including impairment of victims' abilities and willingness to cooperate with and participate in the criminal justice system). Courts have begun to recognize that victims of trauma such as domestic violence and sexual assault may be unable to file claims within the statutory limitations period. See Elizabeth M. Schneider, *Grief, Procedure and Justice: The September 11th Victim Compensation Fund*, 53 DePaul L. Rev. 457, 484 (2003) (explaining the impact of trauma on victims' abilities to assert claims).

- 140 Several reports have detailed recommended reforms. See, e.g., OVC Victim Compensation, *supra* note 76, at 336-51 (detailing eighteen recommendations, including increasing medical benefits for catastrophic physical injuries and eliminating restrictive reporting requirements); Newmark et al., *supra* note 109, at xix (listing recommendations, including outreach to historically underserved victims and a reduction in claims processing time).
- 141 See *Secord v. Fischetti*, 653 N.Y.S.2d 551, 552 (N.Y. App. Div. 1997). Virginia's crime victim compensation board maintained the same policy. Sheila Hahn, the surviving partner of Peggy Neff, who was killed in the terrorist attack on the Pentagon, was denied compensation by the Virginia crime victim compensation board. Despite the fact that they had been partners for over seventeen years, she was not covered under the Virginia crime victim compensation program, which provides survivor benefits only for a spouse or other legally dependent relative. See also Va. Code Ann. §19.2-368(4)(A)(2) (Michie Supp. 2003) (limiting those eligible to file a compensation claim to "[a] surviving spouse, parent, grandparent, sibling or child, including posthumous children"); Chris Lombardi, Partners of Sept. 11 Victims Denied Compensation, Women's eNews, Jan. 19, 2002, at <http://www.womensenews.org/article.cfm/dyn/aid/789/context/archive> (last visited Oct. 13, 2004); Rebecca Farmer, Same Sex Couples Face Post-September 11 Discrimination, Nat'l NOW Times, at <http://www.now.org/nnt/spring-2002/couples.html> (last visited Oct. 13, 2004). Apparently, Ms. Hahn was able to recover from the federal 9/11 Fund. Steve Vogel, U.S. Awards Lesbian 9/11 Compensation for Loss of Partner, Wash. Post, Jan. 23, 2003, at B01; Press Release, Human Rights Campaign, HRC Applauds Justice Department for Awarding Survivor Benefits to Woman who Lost Partner in 9/11 Attack on Pentagon (Jan. 24, 2003), at http://www.hrc.org/Template.cfm?Section=Press_Room&CONTENTID=10006&Template=/ContentManagement/ContentDisplay.cfm (last visited Oct. 13, 2003).
- 142 Exec. Order No. 103.30 (Oct. 10, 2001), 9 N.Y. Comp. Code R. & Regs. §5.113.30 (2004). The executive order also would allow unmarried heterosexual couples who also can prove mutual interdependence. *Id.*
- 143 *Id.* The Executive Order permits gay and lesbian partners of crime victims to recover compensation when the partners can demonstrate that they are dependent on their partners for at least half of their financial support. *Id.* Prior to the Executive Order, the requirement was 75%, which effectively precluded same-sex couples from recovering in most instances. *Id.*
- 144 Nancy J. Knauer, The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy, 75 Temp. L. Rev. 31, 85-86 (2002).
- 145 See Alexander, *supra* note 39, at 632-33.
- 146 Ken Feinberg and his law firm staff worked free of charge, but the 9/11 Fund's administrative costs totaled \$86 million over their three years of work. David W. Chen, Striking Details in Final Report on 9/11 Fund, N.Y. Times, Nov. 18, 2004, at B1.
- 147 See *infra* notes 152-172 and accompanying text.
- 148 ATSSSA, Pub. L. No. 107-42, §401, 115 Stat. 230 (2001) (codified at 49 U.S.C.A. §40101 note (West Supp. 2004)).
- 149 *Id.*; see also, e.g., Robert S. Peck, The Victim Compensation Fund: Born from a Unique Confluence of Events Not Likely to Be Duplicated, 53 DePaul L. Rev. 209, 216-17 (2003).
- 150 ATSSSA §101(a)(1).
- 151 *Id.* §201(b).
- 152 *Id.* §403.
- 153 *Id.* §405(c)(3)(B)(i). The ATSSSA also limited the liability of the airline industry. Congress later extended that protection to limit suits against the City of New York, the Port Authority of New York and New Jersey, the other airports, and Boeing (manufacturer of the airlines used in the attack). *Id.* §408(a) (original provision); Pub. L. No. 107-71, §§201(a), 408(a), 115 Stat. 597, 645-47 (2001) (codified at 49 U.S.C. §40101 note).
- 154 September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified at 28 C.F.R. §104 (2003)).
- 155 Peck, *supra* note 149, at 233.

- 156 ATSSSA §404(b); [September 11th Victim Compensation Fund of 2001](#), 67 Fed. Reg. at 11,234; see also [Schneider v. Feinberg](#), 345 F.3d 135, 142 (2d Cir. 2003) (characterizing the statute authorizing the 9/11 Fund as a “blank check”).
- 157 Like VOCA, which, as discussed at length in Part II.B, *supra*, involves virtually no expenditure of public funding, analogous federal funding schemes for victims of criminal or civil wrongdoing are funded by contributions from the wrongdoers or members of the industry whose activities gave rise to the injuries. See, e.g., Black Lung Benefit Act, 30 U.S.C. §§901, 934 (2000) (requiring operators to repay government for any payments made to claimants); 42 U.S.C. §2210 (2000) (requiring nuclear power plant operators to hold insurance and contribute prescribed amounts to a fund to cover claims in the event of an “extraordinary nuclear occurrence”); 42 U.S.C. §§300aa-10 to -15; 26 U.S.C. §9510 (2000) (funding payments for injuries resulting from vaccination by a fund comprised of taxes on vaccines, for claims arising after effective date of the program; however, public funds were appropriated for pre-existing claims); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C.A. §7246 (West Supp. 2004)) (authorizing a civil penalty for violation of that law's provisions and accepting additional donations to augment payments to victims); see also, e.g., Fairness in Asbestos Injury Resolution Act of 2003, S. 1125, 108th Cong. (2003) (proposing a privately funded, publicly administered fund for victims of bodily injury caused by asbestos exposure); cf. Lydia Pilgreen, *With Funds Winding Down, Questions Remain About Longer-Term Needs*, N.Y. Times, Sept. 9, 2004, at B8 (questioning whether the distribution of most of the private funds raised as direct cash assistance to victims constituted an “unprecedented charitable windfall” that would fail to address their longer-term needs).
- 158 ATSSSA §405. For example, the Act caps recovery from any tort claim at the limits of liability coverage maintained by the air carriers. *Id.* §408(a)(1). The cap was thought to approximate \$1.5 billion per carrier, which would quickly be exhausted, thereby limiting tort recovery. Rabin, *supra* note 77, at 792 (citing Lizette Alvarez & Stephen Labaton, *A Nation Challenged: The Bailout; An Airline Bailout*, N.Y. Times, Sept. 22, 2001, at A1). In addition, any claim would have to be brought in the Southern District of New York, and would be the “exclusive remedy” for damages arising out of the attacks. ATSSSA §408. At its close, the Fund processed over 7300 claims for death and physical injury arising out of the attacks. This includes claims by over 98% of those eligible who lost a family member in the attacks. U.S. Dep't of Justice, *Closing Statement from the Special Master, Mr. Kenneth R. Feinberg, on the Shutdown of the September 11th Victim Compensation Fund*, at [http:// www.usdoj.gov/victimcompensation/closingstatement.pdf](http://www.usdoj.gov/victimcompensation/closingstatement.pdf) (last visited Oct. 21, 2004). Nevertheless, some of those affected by the attacks, including families of those who died as well as injured workers, have brought suit against potentially negligent parties such as airlines, airports, security firms, and airplane manufacturers. See Leslie Eaton, *Legal Battles Reflect Unhealed Wounds of Terror Attack*, N.Y. Times, Sept. 9, 2004, at B1.
- 159 In contrast to litigation, which can easily stretch over a period of years, the statute required the Special Master designated to administer the 9/11 Fund to issue a written determination of each claim within 120 days of each application. ATSSSA §405(b)(3).
- 160 Alexander, *supra* note 39, at 633 n.29.
- 161 [September 11th Victim Compensation Fund of 2001](#), 28 C.F.R. §104.31 (2003).
- 162 Abraham & Logue, *supra* note 20, at 596-97; Rabin *supra* note 77, at 792. The basic calculus for awards includes both economic and noneconomic losses. ATSSSA §405(b)(1)(B)(i). As Professor Rabin notes, this is a very different motivation than those underlying other no-fault systems, such as workers compensation. Rabin, *supra* note 77, at 792-93.
- 163 ATSSSA §405(b)(1)(B)(i). For example, the Special Master established presumed limits for economic harm, based on income levels up to the ninety-eighth percentile of individual income in the United States, or \$231,000. See 28 C.F.R. §104.43; U.S. Dep't of Justice, *Explanation of Process for Computing Presumed Economic Loss*, at [http:// www.usdoj.gov/victimcompensation/vc_matrices.pdf](http://www.usdoj.gov/victimcompensation/vc_matrices.pdf) (last updated Aug. 27, 2002). The 9/11 Fund ultimately used an economic loss methodology that incorporates an “All Active Males” table, in order to maximize the duration of expected foregone earnings and accommodate potential increases by women in the labor force. U.S. Dep't of Justice, *supra*. The legislation also authorized consideration of the value of replacement services in order to recognize the value of unpaid work for all victims, including those who worked full-time. 28 C.F.R. §104.43(c). See generally Martha F. Davis, [Valuing Women: A Case Study](#), 23 *Women's Rts. L. Rep.* 219, 220-21 (2002) (discussing the discriminatory impact of the 9/11 Fund's initially proposed regulations' failure to recognize the value of unpaid work). In addition, instead of allowing for a case-by-case determination of noneconomic loss, the regulations provide for a flat-rate noneconomic loss award of \$250,000 per victim, plus an additional \$100,000 for the spouse and each dependent. 28 C.F.R. §104.44. The \$250,000 sum was derived from the death benefit paid to families of public safety officers and military personnel killed in the line of duty. See 38 U.S.C. §1967 (2000); 42 U.S.C. §3796 (2000). Apparently, this structure reflects Special Master Ken Feinberg's concern for horizontal equity, and the impossibility of assessing the differential pain and suffering experienced by different victims. [September 11th Victim Compensation Fund of 2001](#),

66 Fed. Reg. 66,274, 66,275 (Dec. 21, 2001) (codified at 28 C.F.R. §104) [hereinafter 9/11 Fund Interim Rule] (explaining the goal of ensuring substantial minimum compensation for every claimant).

164 9/11 Fund Interim Rule at 66,274-75. For all cases, the total award calculated from the tables and presentation of losses will be reduced by collateral sources, defined by the statute and accompanying regulations to include life insurance and pensions, as well as death benefit programs and payments by federal, state, or local governments related to the September 11 attacks, but not charitable contributions. ATSSSA §405(b)(6); 28 C.F.R. §104.47. As it turned out, the mean award for deceased victims was \$2,082,035, and the median award was \$1,677,633; the awards for those injured in the attacks ranged from \$500 to \$8.6 million (comparable statistics are not available for both groups). See U.S. Dep't of Justice, September 11th Victim Compensation Fund of 2001: Compensation for Deceased Victims, at http://www.usdoj.gov/victimcompensation/payments_deceased.html (last updated Nov. 22, 2004); U.S. Dep't of Justice, September 11th Victim Compensation Fund of 2001: Compensation for Personal Injury Victims, at http://www.usdoj.gov/victimcompensation/payments_injury.html (last updated Nov. 22, 2004).

165 ATSSSA §405(b)(1)(B)(ii).

166 See *Schneider v. Feinberg*, 345 F.3d 135, 141 (2d Cir. 2003); Fitzgerald L.P. et al., *supra* note 21, at 33-35.

167 The 9/11 Victim Compensation Fund Web site lists centers in Boston, Massachusetts; Jersey City, New Jersey; Long Island, New York; Piscataway, New Jersey; Stamford, Connecticut; Staten Island, New York; Philadelphia, Pennsylvania; San Francisco, California; Los Angeles, California; Arlington, Virginia; and Manhattan, New York. U.S. Dep't of Justice, Claim Assistance Sites, at http://www.usdoj.gov/victimcompensation/claims_assistance_centers.html (last visited Oct. 13, 2004).

168 See U.S. Dep't of Justice, How Can We Help You Today?, at <http://www.usdoj.gov/victimcompensation> (last visited Oct. 13, 2004). Although the availability of information in Spanish is laudable, it may not be sufficient to reach many other groups of victims who are native speakers of other languages. See Safe Horizon, Comments on September 11th Victim Compensation Fund of 2001 (Nov. 21, 2001), at <http://www.usdoj.gov/victimcompensation/W000564.html> (last visited Oct. 13, 2004) [hereinafter Safe Horizon Comments] (recommending availability of program information in multiple languages in addition to Spanish, including Chinese, Haitian/Creole, Russian, Bengali, and Arabic); accord *Schneider*, *supra* note 139, at 478 & n.122 (discussing the limitations of the Web site for those who lack access to computers and those who lack English fluency).

169 See U.S. Dep't of Justice, September 11th Victim Compensation Fund of 2001, Frequently Asked Questions §§1-4, at <http://www.usdoj.gov/victimcompensation/faq.html> (Feb. 10, 2004).

170 For example, fund officials conducted almost 4000 hearings with families to assist in processing their claims. Chen, *supra* note 146 (describing the final report of the 9/11 Fund).

171 Based on that knowledge, Safe Horizon, among others, urged the Special Master to provide victim advocates to assist claimants in preparing and submitting their claims forms. See Safe Horizon Comments, *supra* note 168.

172 Fund officials conducted approximately 100 outreach sessions, including presentations to large groups of over 600 people, as well as small gatherings with a half-dozen individuals. E-mail from Ken Feinberg to Heather Pratt (Jan. 17, 2004) (on file with author). Special Master Ken Feinberg also conducted hundreds of individual meetings with group members to answer their individual, personal questions about the fund. *Id.*; see also, e.g., Where Are the Victims' Families?, N.Y. Times, Sept. 7, 2003, Week in Review at 12 (noting "national advertising campaign" to encourage 9/11 Fund participation).

173 See, e.g., Symposium, *After Disaster: The September 11th Compensation Fund and the Future of Civil Justice*, 53 DePaul L. Rev. 205 (2003); Symposium, *The Law and Economics of Providing Compensation for Harm Caused by Terrorism*, 36 Ind. L. Rev. 229 (2003); see also, e.g., Marshall S. Shapo, *Compensation for Victims of Terror: A Specialized Jurisprudence of Injury*, 30 Hofstra L. Rev. 1245, 1259 (2002); Rabin, *supra* note 10; Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 Clev. St. L. Rev. 573 (2001).

174 Alexander, *supra* note 39, at 632.

175 *Id.* at 638.

176 Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DePaul L. Rev. 719, 721 (2003). Professor Diller notes that the 9/11 Fund is distinguishable from mass tort settlement in several ways: the 9/11 Fund does not require claimants

to compromise their compensation levels; it also does not require the administrator to grapple with the difficult problem of distributing a set, and inadequate, pool of funds. *Id.* at 746-47. In addition, the 9/11 Fund provides the award benefits to claimants without them having to go through the trouble and expense of filing a lawsuit, engaging in some degree of litigation, and engaging in settlement negotiations. *Id.* at 745-46.

- 177 See, e.g., Rabin, *supra* note 173, at 574-76 (concluding that the 9/11 Fund more closely resembles a “no-fault plan” than “mini version of the tort system”); see also Rabin, *supra* note 77, at 783-88; Diller, *supra* note 176, at 721-23; Alexander, *supra* note 39, at 639.
- 178 See W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on Torts* §4 (5th ed. 1984). Presumably, the bill was designed to protect the airline industry and other private entities from potential liability, and does not assign responsibility to the government for any potential liability for the attacks. However, some commentators have inquired whether the government might appropriately bear the cost as a result of its responsibility for failing to detect or prevent the attacks. See, e.g., Rabin, *supra* note 10, at 1867; Schneider, *supra* note 139, at 485-90; Shapo, *supra* note 10, at 813, 816; Samuel Issacharoff & Anna Morawiec Mansfield, *Compensation for the Victims of September 11*, at 16 (unpublished manuscript, on file with author). The report of the 9/11 Commission may support these conclusions. See generally Nat’l Comm’n on Terrorist Attacks upon the U.S., *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (recounting events that led to the attacks and failures that may have contributed to allowing them to occur).
- 179 Rabin, *supra* note 77, at 773; Anthony J. Sebok, [What’s Law Got to Do with It? Designing Compensation Schemes in the Shadow of the Tort System](#), 53 *DePaul L. Rev.* 501, 505-15 (2002). As Professor Diller points out, lawsuits based on other terrorist attacks have not been successful against anyone other than the terrorists themselves. Diller, *supra* note 176, at 722. But see *In re Sept. 11 Litig.*, 280 F. Supp. 2d 279, 314 (S.D.N.Y. 2003) (denying motion to dismiss negligence and related claims by families of individuals killed as a result of the September 11 attacks against air carriers, airport security companies, the Port Authority of New York and New Jersey, and the World Trade Center Properties).
- 180 September 11th Victim Compensation Fund of 2001, 28 C.F.R. §104.43 (2003); accord Stephan Landsman, [A Chance to Be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund](#), 53 *DePaul L. Rev.* 393, 400-02 (2003); Rabin, *supra* note 173, at 583-85; see also Diller, *supra* note 176, at 740 (criticizing the argument that presumptive award tables serve public benefit program goals of creating parity between claimants, predictability, and administrative ease). Nevertheless, the “core principles used by the fund” to determine award amounts draws on a tort, rather than social welfare, model. See Diller, *supra* note 176, at 740; accord Shapo, *supra* note 10, at 813-14.
- 181 See discussion *supra* note 164. In contrast to the 9/11 Fund awards, tort awards are not generally reduced by collateral offsets because to do so would unfairly privilege defendants lucky enough to have injured parties who planned well, for example, by obtaining sufficient life insurance. This concern is absent in the 9/11 Fund because it requires no tortfeasor, or potential tortfeasor, contribution. Notably, no significant nontort source of compensation for lost life requires collateral offset for life insurance. Abraham & Logue, *supra* note 20, at 592; see also Robert A. Katz, [Too Much of a Good Thing: When Charitable Gifts Augment Victim Compensation](#), 53 *DePaul L. Rev.* 547, 563-66 (2003); Shapo, *supra* note 173, at 1255.
- 182 See, e.g., Rabin, *supra* note 77, at 771-72 (“A long, bitter contest over years, in which families of September 11th victims had nothing beyond recriminations, bitterness, and frustration with ‘the system,’ almost certainly would have been regarded as intolerable to the national community.”); Shapo, *supra* note 173, at 1252 (describing the 9/11 Fund as “both a symbol of displaced vengeance and a marker of social compassion”).
- 183 September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (Dec. 21, 2001) (codified at 28 C.F.R. §104).
- 184 September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified at 28 C.F.R. §104).
- 185 Alexander, *supra* note 39, at 638. As of September 2003, \$2.6 billion in private, philanthropic funds had been donated to support charitable efforts in response to the September 11 attacks. Loren Renz, *9/11 Relief and Regranting Funds: A Summary Report on Funds Raised and Assistance* 12 (2003), available at http://www.fdncenter.org/research/trends_analysis/pdf/9_11relief_funds.pdf; cf. Lydia Polgreen, *With Funds Winding Down, Questions Remains About Longer-Term Needs*, N.Y. Times, Sept. 9, 2004, at B8 (NY region, 09 Charities) (questioning whether the distribution of most of the private funds raised as direct cash assistance to victims constituted “unprecedented charitable windfall” that would fail to address their longer term needs).

- 186 Alexander, *supra* note 39, at 638. Alexander suggests that the possibility that the federal government may have been partly at fault may also have played a role in the remedy fashioned. *Id.*; see also discussion and sources cited *supra* note 178.
- 187 See Rabin, *supra* note 77, at 771.
- 188 See 147 Cong. Rec. H.R.5894 (daily ed. Sept. 12, 2001) (statement of Rep. Young). Debate in the House was limited to one hour. 147 Cong. Rec. E1764 (daily ed. Oct. 2, 2001) (statement of Rep. Waxman).
- 189 Notably, to the extent Congress expressed opposition to the 9/11 Fund before it was enacted, members focused primarily on the limits it imposed on victim compensation. See, e.g., 147 Cong. Rec. H.R.5905 (daily ed. Sept. 21, 2001) (statement of Rep. Jones) (objecting to the bill's failure to include amounts for punitive damages and reduction of compensation based on collateral source compensation, and objecting to the 9/11 Fund's limiting compensation for survivors while imposing no liability on the airlines); 147 Cong. Rec. H.R.5911 (daily ed. Sept. 21, 2001) (statement of Rep. LaFalce) (objecting to inequities created by virtue of basing compensation on the amount of deceased worker's earnings). A few Congresspersons, however, raised concerns about whether the 9/11 Fund was overly generous, questioning whether the tort model was appropriate in a scheme in which the taxpayer was paying for the benefits, and whether this would then be the model for future compensation programs. 147 Cong. Rec. E1764 (daily ed. Oct. 2, 2001) (statement of Rep. Waxman); 147 Cong. Rec. S9603 (daily ed. Sept. 12, 2001) (statement of Senator Enzi). The other primary objections to the ATSSSA focused on its failure to provide more assistance for workers who were laid off as a result of the attacks. See, e.g., 147 Cong. Rec. H.R.5907 (daily ed. Sept. 21, 2001) (statement of Rep. Oberstar); 147 Cong. Rec. H.R.5911 (daily ed. Sept. 21, 2001) (statement of Rep. McCarthy); 147 Cong. Rec. H.R.5911 (daily ed. Sept. 21, 2001) (statement of Rep. LaFalce) (objecting as well to the bill's failure to federalize airline security); 147 Cong. Rec. H.R.5912 (daily ed. Sept. 21, 2001) (statement of Rep. Rahall); 147 Cong. Rec. H.R.5915 (daily ed. Sept. 21, 2001) (statement of Rep. Stark); 147 Cong. Rec. S9595 (daily ed. Sept. 21, 2001) (statement of Sen. Feingold); 147 Cong. Rec. S9598 (daily ed. Sept. 21, 2001) (statement of Sen. Kennedy).
- 190 147 Cong. Rec. S9589, S9594 (daily ed. Sept. 21, 2001).
- 191 147 Cong. Rec. S9589, S9598 (daily ed. Sept. 21, 2001).
- 192 *Id.*; accord 147 Cong. Rec. H.R.5913 (daily ed. Sept. 21, 2001) (statement of Rep. Delahunt). Interestingly, Senator Leahy supported the program's focus on helping the "neediest" victims and their families, and therefore supported reducing awards by the amount received through life insurance, death benefits, or other government programs. 147 Cong. Rec. S9599 (daily ed. Sept. 21, 2001) (statement of Sen. Leahy).
- 193 147 Cong. Rec. S9594 (daily ed. Sept. 21, 2001) (statement of Sen. Hatch); accord 147 Cong. Rec. S9593 (daily ed. Sept. 21, 2001) (statement of Sen. Schumer).
- 194 See, e.g., 147 Cong. Rec. H.R.5906 (daily ed. Sept. 21, 2001) (statement of Rep. Turner); 147 Cong. Rec. H.R.5897 (daily ed. Sept. 21, 2001) (statement of Rep. Young) (characterizing bill as "very responsive to victims of terrorist attacks"); 147 Cong. Rec. H.R.5898 (daily ed. Sept. 21, 2001) (statement of Rep. Gephardt) (noting "horror to our American family" and the violation, grief, and sadness they inflicted); 147 Cong. Rec. S9589 (daily ed. Sept. 21, 2001) (statement of Sen. Bond) (citing need for a "structured means of providing compensation to the victims").
- 195 See *supra* notes 173-186 and accompanying text. As Professor Issacharoff put it, the 9/11 Fund represented "a rushed amalgam of congressional desire to induce families out of the tort system while attempting to reflect a more altruistic national purpose." Issacharoff & Mansfield, *supra* note 178, at 29.
- 196 In the aftermath of the attacks, a stream of newspaper articles reported complaints that victims were required to fill out multiple, duplicative forms, and had to re-tell their stories to be eligible for compensation. See, e.g., David Barstow, Notebooks: Program to Help With Paperwork Maze, *N.Y. Times*, Dec. 11, 2001, at B6 (describing a new city program assigning caseworkers to families of those killed as a result of the September 11 attacks, to address "months of widespread complaints about bureaucratic bumbling and needless red tape" resulting from the "vast network" of charities and public agencies providing assistance to victims); David Barstow, The Donations: Spitzer Plans to Coordinate Charity Efforts for Victims, *N.Y. Times*, Sept. 26, 2001, at B10 (describing the N.Y. Attorney General's efforts to promote coordination in response to perceived "confusion, duplication and red tape" associated with private relief work); David Barstow & Diana B. Henriques, The Charities: Charity Abundant, But So Is Red Tape, After Terror Attack, *N.Y. Times*, Oct. 28, 2001, at A1 (reporting that victims were "overwhelmed" by a "maze" of duplicative and confusing rules, deadlines, and requirements for charitable assistance); Martin Kasindorf & Haya El Nasser, Huge Aid Pool Just Adds to 9/11

Turmoil, U.S.A. Today, Dec. 18, 2001, available at <http://www.usatoday.com/news/sept11/2001/12/19/usat-charity.htm> (last visited Oct. 13, 2004) (same); Stephanie Saul, 9/11 One Year Later: With Hearts, Wallets Open, Donations to 9/11 Charities Keep Flowing, *Newsday*, Sept. 15, 2002, at A7 (same); Howard Arenstein, Where's the Money?, at <http://www.cbsnews.com/stories/2001/11/07/archive/main317216.shtml?CMP-ILC-SearchStories> (last visited Oct. 13, 2004) (recounting victims' frustration and criticism of the Red Cross's administration of disaster assistance).

- 197 These concerns have been raised even in the context of benefits provided to domestic violence victims, a group one might expect to be viewed with general sympathy. In one recent example, New York City Human Resource Commissioner Jason Turner accused battered women of making false claims of domestic violence in order to obtain subsidized housing benefits. See, e.g., Press Release, NOW Legal Defense and Education Fund, Mark Green, et al., Challenge Mayor Giuliani and Governor Pataki to Refute City Commissioner Jason Turner's Remarks About Battered Women (Jan. 21, 1999), available at <http://www.nowldef.org/html/news/pr/Archive/012199jl.shtml> (last visited Oct. 13, 2004). By contrast, no special concern about fraud was raised in connection with those filing with the 9/11 Fund.
- 198 Safe Horizon is the nation's leading victim assistance and advocacy organization. It operates over eighty programs for victims of domestic violence, sexual assault, and other crimes throughout New York City. It also was one of the chief providers of practical and social services to victims of the September 11 terror attacks, having been designated to distribute the funds raised by the United Way and New York Community Trust to victims of the attack. See Safe Horizon Web site, <http://www.safehorizon.org> (last visited Oct. 13, 2004). In the interest of full disclosure, the author was General Counsel at Safe Horizon between March 2001 and April 2003.
- 199 42 U.S.C. §10602(d)(3) (2000).
- 200 Compare, e.g., supra notes 3-8 and accompanying text (recounting statistics documenting scope of domestic and sexual violence), with Phil Hirschkom, New York Reduces 9/11 Death Toll by 40, at <http://www.cnn.com/2003/US/Northeast/10/29/wtc.deaths/index.html> (last visited Oct. 13, 2004) (reporting official death toll as 2752 in New York City, including 127 airplane passengers, 20 crew members, and 10 hijackers). The September 11 victims all suffered as a result of one act. Although domestic violence and sexual assault impact victims through multiple attacks, both the nature of the attacks and their impacts on victims share common traits across victim experiences.
- 201 See, e.g., Schneider, supra note 139, at 469-72 (recounting reports of psychological responses to the September 11 attacks).
- 202 For example, although patterns of violence and abuse and the resulting responses will vary from case to case, domestic violence can lead to post traumatic stress reactions, including Post Traumatic Stress Disorder (PTSD). See Nat'l Inst. of Justice, The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials 6-10 (May 1996), at <http://www.ncjrs.org/pdffiles/batter.pdf> (last visited Oct. 13, 2004) (summarizing psychological literature describing patterns of battering and patterns of responses); Judith Herman, *Trauma and Recovery* 7-129 (1997) (describing psychological reactions to trauma such as domestic and sexual violence). Dr. Lenore Walker introduced the concept of "battered woman syndrome" to describe what she observed as the common patterns of violence perpetrated by abusers and the common responses of victims to the abuse. Lenore E. Walker, *The Battered Woman* (1979). Her approach has been widely criticized as inaccurately essentializing battered women's experience in a way that presents a particularly inaccurate description of battered women of color. See, e.g., Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 *UCLA Women's L.J.* 191, 193-95 (1991); Ammons, supra note 137, at 1015-16; Elizabeth M. Schneider, *Resistance to Equality*, 57 *U. Pitt. L. Rev.* 477, 505-06 (1996). Nevertheless, theorists agree that common patterns describe abusive behaviors and victims' responses. See, e.g., Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 *Hofstra L. Rev.* 1191, 1218-26 (1993); Evan Stark, *Re-presenting Woman Battering: From Battered Women's Syndrome to Coercive Control*, 58 *Alb. L. Rev.* 973, 992-1000 (1995). Victims of sexual assault similarly experience common responses to the trauma. See Rebecca Campbell, *Mental Health Issues for Rape Survivors: Current Issues in Therapeutic Practice: What Are Rape Survivors Experiencing and What Issues May They Present in Therapy*, at <http://www.vaw.umn.edu/documents/commissioned/campbell/campbell.html#id2633290> (last visited Oct. 13, 2004) (summarizing social science studies). Both domestic violence and sexual assault survivors, like other crime victims, report higher rates of PTSD and depression than the general public. Nat'l Ctr. for Victims of Crime, *Repairing the Harm: A New Vision for Crime Compensation in America* 9-10 (2004). Crime victims generally "are at greater risk of developing PTSD than victims of noncriminal traumatic events such as natural disasters." *Id.* at 9 (citing Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 116 *J. Traumatic Stress* 119, 126 (2003)).
- 203 See Campbell, supra note 202; Schneider, supra note 139, at 468-69.

- 204 As a result of the attacks, families of those killed reported an average income drop of 40%, including all charitable and government assistance received as of the spring of 2002, and over half of the surviving spouses had no independent form of employment on the day of the attack. McKinsey & Co., *A Study of the Ongoing Needs of People Affected by the World Trade Center Disaster 12*, available at <http://www.9-11usg.org/uploadFiles/index3.asp?page=REPSTUDIDX#critical> (June 27, 2002) (last visited Oct. 13, 2004). See *infra* Part V.A (discussing the economic ramifications of domestic and sexual violence).
- 205 See *supra* Part IV.B.5 (addressing formal barriers to tort recovery for crime victims); see also *supra* Part II.A (discussing the availability of restitution). Although claims against the terrorists are not barred as a legal matter, the possibility of recovery is uncertain. Compare, e.g., *Smith v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217, 241 (S.D.N.Y. 2003) (holding Iraq and the Al Qaeda defendants (Taliban, Bin Laden, Al Qaeda, and the Islamic Emirate of Afghanistan) responsible, and awarding plaintiffs over \$100 million); with *Smith v. Fed. Reserve Bank of N.Y.*, 280 F. Supp. 2d 314, 324 (S.D.N.Y. 2003) (rejecting plaintiffs' efforts to attach assets of the former Republic of Iraq, frozen at the beginning of the first Gulf War, in order to pay the \$100 million judgment), *aff'd*, 346 F.3d 264 (2d Cir. 2003). See generally Pamela S. Falk, *Show Them the Money: Victims of the Sept. 11 Attacks May Wrest Some Monetary Victory from the Coffers of the Taliban Government*, *Legal Times*, Oct. 1, 2001, at 52 (detailing possibilities for recovering tort damages from terrorists); Pamela S. Falk, *Families of Missing Have Three Options*, *N.Y. L.J.*, Nov. 27, 2001, at 5 (same).
- 206 For example, surviving family members may be able to recover under wrongful death statutes, while those injured as a result of violence typically must rely on traditional tort doctrines.
- 207 See Jennifer Wiggins, *Domestic Violence Torts*, 75 *S. Cal. L. Rev.* 121, 135-36 (2001) (detailing the unavailability of insurance for victims of domestic violence).
- 208 Issacharoff & Mansfield, *supra* note 178, at 4.
- 209 Peter H. Schuck, *Nat'l Ctr. for Victims of Crime, Some Thoughts on Compensating Victims 11* (May 2003), available at <http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspx?DocumentID=32596> (last visited Oct. 13, 2004).
- 210 See Shapo, *supra* note 173, at 1259.
- 211 See, e.g., Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 *Ohio St. L.J.* 1, 16 (2000) (analogizing domestic violence and group-based crime); Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 *Mich. L. Rev.* 320, 321 n.4 (1994) (defining "bias" crime); Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 *S. Cal. L. Rev.* 47, 108-25 (1997) (discussing effects of "bias crimes"); Steven Bennett Weisburd & Brian Levin, "On the Basis of Sex": Recognizing Gender-Based Bias Crimes, 5:2 *Stan. L. & Pol'y Rev.* 21, 24 (1994) (recognizing gender-based "bias" crime); see also *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (recognizing that bias motivated crimes inflict "greater individual and societal harm" than nonbias motivated crime).
- 212 Hillel Sommer, *Providing Compensation for Harm Caused by Terrorism: Lessons Learned in the Israeli Experience*, 36 *Ind. L. Rev.* 336, 340 n.24 (2003).
- 213 *Id.* For example, if a terrorist attacks someone he knows, whether an employer, an intimate partner, or a cocriminal, it may be difficult to determine whether the act should be characterized as a "crime" or a "terrorist" act. *Id.*
- 214 See, e.g., Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 *Harv. Women's L.J.* 217, 335 & n.747 (2003) (analogizing domestic violence to terrorist behavior). Social scientists have reached the same conclusion. See Goldfarb, *supra* note 211, at 16 (identifying the "terroristic function" served by group based violence, including gender-based violence, as it operates to intimidate not only the individual, but also all other members of the group); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 *Harv. L. Rev.* 135, 154 (2000) (describing gender based violence as "privately executed but socially systematic terrorism"); Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, in *The Public Nature of Private Violence* 11, 31 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (arguing that the violence commonly described as "domestic violence" more accurately is described as terrorism); see also *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Drugs, and Alcoholism of the Senate Comm. on Labor and Human Resources*, 101st Cong. (1990) (analogizing domestic violence to terrorism); Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, available at <http://www.personal.psu.edu/faculty/m/p/mpj/JFI03.html> (forthcoming in *J. Fam. Issues*) (last visited Oct. 13, 2004) (categorizing domestic violence involving male domination of women as "intimate partner terrorism"); Purple Berets, *Fighting*

Domestic Terrorism, at http://www.purpleberets.org/violence_fightingdv.html (last visited Oct. 13, 2004) (same); Chaer Robert, Domestic Violence: The Other Terrorism, at www.denvergov.org/Women/template113346.asp (last visited Oct. 13, 2004) (same); Lisa Wallace, Domestic Violence Is Terrorism, at <http://www.cfc.ky.gov/cfconline/Oct2002/Rally.htm> (last visited Oct. 13, 2004) (same).

215 See sources cited *supra* note 211.

216 One aspect of crime victim compensation programs that has generated substantial debate is the question whether convicted criminals can profit from their crimes through publications or other forms of speech. Numerous articles have addressed the Supreme Court's decision in 1991 to strike New York's statute prohibiting convicted criminals from profiting from their crimes as infringing their First Amendment expressive rights. See *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); see, e.g., Mario M. Cuomo, The Crime Victim in a System of Criminal Justice, 8 St. John's J. Legal Comment 1, 15-19 (1992); Garrett Epps, Wising Up: "Son of Sam" Laws and the Speech and Press Clauses, 70 N.C. L. Rev. 493, 499 (1992); Robert Mazow, *Simon & Schuster v. New York State Crime Victims Board: Should the Supreme Court Have Invalidated New York's Son of Sam Statute?*, 28 New Eng. L. Rev. 813 (1994); Kevin S. Reed, Criminal Anti-Profit Statutes and the First Amendment: *Simon & Schuster, Inc. v. New York Crime Victims Board*, 15 Harv. J.L. & Pub. Pol'y 1060, 1061 (1992). Only a few articles have addressed the general structure and approach of victim compensation programs since their enactment. See, e.g., Jennifer Gerarda Brown, *Robbing the Rich to Feed the Poor?* 3 Buff. Crim. L. Rev. 261 (1999) (arguing that some federal victims of crime should not be precluded from compensation under VOCA funded programs); Desmond S. Greer, A Transatlantic Perspective on the Compensation of Crime Victims in the United States, 85 J. Crim. L. & Criminology 333, 335 (1994) (comparing the U.S. system for crime victim compensation with the crime victim compensation system of Great Britain); Smith, *supra* note 58, at 52-57 (recounting program scope and requirements as of the mid-1980s).

217 The debate over these programs gave rise to several important journal publications in which scholars recounted the history of compensation programs and debated proposals. See, e.g., Compensation for Victims of Criminal Violence: A Round Table, 8 J. Pub. L. 191 (1959); Symposium, Compensation to Victims of Personal Violence: An Examination of the Scope of the Problem, 50 Minn. L. Rev. 213 (1965-66); Symposium, Governmental Compensation for Victims of Violence, 43 S. Cal. L. Rev. 5 (1970).

218 See *supra* notes 152-160 and accompanying text.

219 Peter Cane, Atiyah's Accidents, Compensation and the Law 4 (6th ed. 1999). Crime victim compensation programs also can be seen as advancing some or all of the following goals: corrective justice, distributive justice, deterrence, and moral affirmation. Schuck, *supra* note 209, at 3. Programs advance corrective justice in that they require the wrongdoer to recreate the equality that existed between the victim and offender prior to the wrongful act. See Jules L. Coleman, Risks and Wrongs (1992); Schuck, *supra* note 209, at 4; George P. Fletcher, Symposium, The Place of Victims in the Theory of Retribution, 3 Buff. Crim. L. Rev. 51, 54 (1999); Ernest J. Weinrib, Corrective Justice, 77 Iowa L. Rev. 403, 407-09 (1992). The schemes also can be seen as a form of distributive justice in that they involve a choice of criteria through which benefits are distributed to eligible recipients and in that they establish a relationship between the victim, the wrongdoer, and the community. See, e.g., John E. Roemer, Theories of Distributive Justice 1-11 (1996); Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 Yale L.J. 949, 981 (1988). Conceptually, the schemes can advance deterrence by requiring the perpetrator to bear some of the costs of the injury, although the extent to which they would affect that goal is necessarily limited by the limited fines and fees that comprise victim compensation funds. They can also provide moral affirmation for the victim through a social recognition of the wrongfulness of the act. See Schuck, *supra* note 209, at 7.

220 Lamborn, *supra* note 58, at 462; Schafer, *supra* note 40, at 58-59.

221 Arthur J. Goldberg, Equality and Governmental Action, 39 N.Y.U. L. Rev. 205, 224 (1964).

222 See Joe Hudson & Burt Galloway, Victim Compensation: An Analysis of Substantive Issues, in Considering the Victim, *supra* note 41, at 421, 421-22; James Brooks, The Case for Creating Compensation Programs to Aid Victims of Violent Crime, 11 Tulsa L.J. 477, 479 (1976); Childres, *supra* note 10, at 455-56 (citing failure of police protection as justifying societal responsibility for losses that result from crime as part of a "moral argument" in support of crime victim compensation programs); Fry, *supra* note 62, at 193 (citing state responsibility for the "occasional failure to protect" in light of state prohibition of citizens "going armed in self-defence"); Lamborn, *supra* note 58, at 462; Schafer, *supra* note 40, at 58-59.

223 Lamborn, *supra* note 58, at 462.

- 224 Id. at 462-63 (citing [Restatement \(Second\) of Torts §323 \(1965\)](#)).
- 225 Childres, *supra* note 10, at 456.
- 226 Id.
- 227 Generally, the state has been held to have no duty to protect individuals in its care. See [DeShaney v. Dep't of Soc. Servs.](#), 489 U.S. 189, 196 (1989). However, courts have found law enforcement officials to have a duty to provide police protection in some limited circumstances, for example, when police create a “special relationship” with individuals, such as domestic violence victims, by placing them in more dangerous situations than they would have been otherwise. See, e.g., [Freeman v. Ferguson](#), 911 F.2d 52, 55 (8th Cir. 1990) (upholding a claim against a batterer by the family of a murdered woman and child based on allegations that the police chief affirmatively told officers not to take action against the batterer who subsequently killed them). But see, e.g., [Pinder v. Johnson](#), 54 F.3d 1169, 1175 (4th Cir. 1995) (finding no special relationship despite allegations that police assured the batterer's former girlfriend that she was safe to go to work and leave her children home alone because the batterer was in jail, but instead released the batterer, who went to her home and burned it down, killing her three children inside), cert. denied, 516 U.S. 994 (1995). Courts have also found municipality liability based on a showing that the police department's treatment of domestic violence victims violated their equal protection rights. See, e.g., [Macias v. Ihde](#), 219 F.3d 1018, 1028 (9th Cir. 2000) (upholding a claim by a battered woman's estate that the police deprived her of equal protection by providing her with inferior police protection on account of her status as a woman, a Latina, and a victim of domestic violence). Notably, in November 2004, the United States Supreme Court granted certiorari in a case in which the Court of Appeals for the Tenth Circuit found that a mother whose children were killed by their father, against whom she had a court-issued restraining order that the police refused to enforce, contrary to the governing state statute, had a procedural due process right to have the order enforced. [Gonzales v. City of Castle Rock](#), 366 F.3d 1093 (10th Cir. 2004), cert. granted, 73 U.S.L.W. 3271 (Nov. 2, 2004). The outcome of that case may determine whether procedural due process may give rise to state obligations to victims of violence. See generally, e.g., Peter H. Schuck, *Suing Government* (1983) (presenting theories supporting government liability for wrongdoing).
- 228 Schafer, *supra* note 40, at 59 (viewing compensation programs as calling on the “conscience of the twentieth century man who cannot tolerate the misery of the helpless”); accord [Goldberg](#), *supra* note 221, at 224; [Smith](#), *supra* note 58, at 62-63.
- 229 See [Lamborn](#), *supra* note 58, at 464. This argument sometimes is referred to as the “moral argument” in support of compensation. See, e.g., [Childres](#), *supra* note 10, at 455-56 (citing the state's partial responsibility for an incarcerated criminal's inability to compensate the victim). As Professor Childres argues, aside from the criminal, the state is the party “next most responsible” for the crime. Id. at 456; see also [Smith](#), *supra* note 58, at 63-66 (articulating and critiquing the “welfare theory” based on the idea that a state owed a “humanitarian obligation” to victims of crime). Some theorists worried that victim compensation systems would be duplicative of social welfare programs. See, e.g., [Smith](#), *supra* note 58, at 68. Others contended that the two programs served distinct purposes. See, e.g., [Childres](#), *supra* note 10, at 462 (distinguishing social welfare from victim compensation programs on the basis, *inter alia*, that they rest on different rationales and address distinct problems, and arguing that crime victims should not have to divest all assets to receive compensation).
- 230 LeRoy G. Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime*, in *Considering the Victim*, *supra* note 41, at 130, 132-33; [Fry](#), *supra* note 62, at 192; [Schafer](#), *supra* note 40, at 59. The British system, in which general tax dollars support crime victim compensation programs, reflects this approach. [Schafer](#), *supra*, note 40, at 61; [McGee](#), *supra* note 41, at 69.
- 231 [Fry](#), *supra* note 62, at 192.
- 232 Id.
- 233 [Jeremy Bentham](#), *Political Remedies for the Evil of Offenses* (1838), reprinted in *Considering the Victim*, *supra* note 41, at 29, 42. In this sense, the social welfare rationale is related to the legal duty theory described above.
- 234 [Goldberg](#), *supra* note 221, at 225.
- 235 See [Peter Benson](#), *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 *Iowa L. Rev.* 515, 536 (1992); [Weinrib](#), *supra* note 219, at 407-08.
- 236 See *supra* notes 106-108 and accompanying text.

- 237 See supra notes 156, 175-180 and accompanying text.
- 238 See supra note 229 and accompanying text.
- 239 See infra Part IV.B.5.
- 240 See infra notes 242-247 and accompanying text.
- 241 Childres, supra note 10, at 444.
- 242 Smith, supra note 58, at 68-71. However, Professor Smith argues that empirical data suggest that compensation does not effectively encourage victims to participate. She cites the fact that because only a small percentage of victims file for compensation, the availability of compensation does not have a “spillover” effect onto other victims. *Id.* at 70. In addition, she recognizes that cooperating with law enforcement may contribute to the difficulties crime victims already face in coping with violence, as it exacerbates issues such as lost wages, time away from daily responsibilities, and emotional distress resulting from the crime. *Id.*
- 243 Arthur J. Goldberg, Preface, 43 S. Cal. L. Rev. 1, 2 (1970) (introducing a symposium issue on “Governmental Compensation for Victims of Violence”).
- 244 The Victims of Crime Assistance Act of 1984: Hearing on S.2423 Before the Senate Comm. on the Judiciary, 98th Cong. 9 (1984) [hereinafter VOCA Hearing].
- 245 *Id.* at 10.
- 246 Victims of Crime Act of 1984, 42 U.S.C. §10602(b)(2) (2000) (requiring victims to cooperate with law enforcement's reasonable requests).
- 247 See supra Part III.
- 248 Roland, supra note 58, at 35. It is therefore no surprise that crime victim programs began to be developed at the same time that the “War on Crime” received increasing attention.
- 249 Schafer, supra note 40, at 59.
- 250 See, e.g., infra notes 252-254 and accompanying text.
- 251 See infra Part V.A.
- 252 Fry, supra note 62, at 192.
- 253 *Id.* at 193. The writings of Jeremy Bentham support Fry's approach. He argued that while the best source of compensation for losses resulting from crime is the offender, the cost of losses that the offender cannot pay should be borne by the state because “it is an object of public benefit; the security of all is concerned.” Bentham, supra note 233, at 39.
- 254 Childres, supra note 10, at 457. Professor Childres reasoned that this theory would give rise to one of two solutions: state compensation or compulsory insurance. *Id.* He rejected compulsory insurance as unaffordable to many citizens, and referenced the failure of private insurance in the workers' compensation context to conclude that victim compensation should be funded by the state. *Id.* at 457-59; see also Smith, supra note 58, at 66-68. Note, however, that some theorists worried that victim compensation systems would be duplicative of social welfare programs. See, e.g., Smith, supra note 58, at 68.
- 255 The legislative history proposing that the program would be funded in large part by defendant fines and fees reflects Congress's intent to implement a distributive justice approach. See S. Rep. No. 98-497, at 14 (1984). For example, Senator Thurmond, in urging Congress to approve VOCA, emphasized the use of profits obtained by criminals to help make the victims whole. VOCA Hearing, supra note 244, at 8-9 (statement of Sen. Thurmond); see also Lamborn, supra note 58, at 450-54; McGee, supra note 41, at 68-69; Wolfgang, supra note 58, at 229-30.
- 256 See infra notes 277-284 and accompanying text.

- 257 Initially, objections were raised to pooling defendant fines, based on the argument that an offender should not be held accountable for the losses resulting from crime committed by another defendant. NIJ Compensation Analysis, *supra* note 114, at 121. However, these arguments have been rejected by courts, which have upheld fines on criminal defendants as long as they were not “excessive” or “harsh” or civil in nature. See *State v. Champe*, 373 So. 2d 874, 880 (Fla. 1978); *McKay v. Las Vegas*, 789 P.2d 584, 586-87 (Nev. 1990).
- 258 Defendant fines range from \$3, for traffic fines and misdemeanors, to \$10,000 for child pornography. Office for Victims of Crime, U.S. Dep’t of Justice, State Legislative Approaches to Funding for Victims’ Services 1-2, at [http:// www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin9/ncj199477.pdf](http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin9/ncj199477.pdf) (last visited Oct. 13, 2004).
- 259 Benson, *supra* note 235, at 536.
- 260 See Frank W. Miller, Compensation for Crimes of Criminal Violence: A Round Table, 8 J. Pub. L. 203, 207-08 (1959).
- 261 ATSSSA, Pub. L. No. 107-42, §405(c)(3)(B)(i), 115 Stat. 230 (2001) (codified at 49 U.S.C.A. §40101 note (West Supp. 2004)); see *supra* notes 153-181 and accompanying text.
- 262 See *supra* notes 151, 158-166 and accompanying text.
- 263 ATSSSA §402.
- 264 Rabin and others have suggested that the government might be the appropriate source of funding for the program given the evidence indicating that the government was in fact negligent in failing to take appropriate steps to prevent the September 11 attacks in light of information it had available at the time. See discussion *supra* note 178.
- 265 Alexander, *supra* note 39, at 636-54.
- 266 *Id.* at 637.
- 267 Rabin, *supra* note 77, at 771.
- 268 *Id.*
- 269 *Id.* at 772.
- 270 See discussion *supra* note 178.
- 271 See *supra* Part II.B.2.
- 272 See *infra* note 277 and accompanying text.
- 273 However, those who bring successful claims must repay amounts recovered that duplicate state program awards as a way to prevent duplicate recovery and safeguard the state programs as the payor of last resort. See *supra* note 123 and accompanying text.
- 274 Lamborn, *supra* note 58, at 450-51; McGee, *supra* note 41, at 70; Smith, *supra* note 58, at 60-61.
- 275 See Fry, *supra* note 62, at 191-94 (citing inadequacy of restitution payments as justification for government supported victim compensation programs); Miller, *supra* note 260, at 208; cf. Lamborn, *supra* note 58, at 450, 462-63 (arguing that the limitations of traditional remedial measures, combined with the government’s duty to assist crime victims and a commitment to social welfare, justify government supported crime victim compensation programs).
- 276 See *supra* Part II.A.
- 277 See, e.g., Leonard I. Karp & Cheryl L. Karp, Domestic Torts: Family Violence, conflict and Sexual Abuse §1.20 (2003); see also Clare Dalton, Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities, 31 New Eng. L. Rev. 319, 327-28 (1997); Wiggins, *supra* note 207. In one recent and highly unusual case, a Massachusetts court awarded a domestic violence victim \$9 million in recovery from her abusive boyfriend who broke her neck. Associated Press, Domestic Violence Victim Awarded \$9 Million in Action Against Abuser, available at [http:// www.ohiodvresources.org/atinfo/news/article.php?id=447](http://www.ohiodvresources.org/atinfo/news/article.php?id=447) (last visited Oct. 13, 2003).

- 278 See, e.g., Press Release, U.S. Dep't of Justice, Justice Dep't Awards over \$23 Million for Civil Legal Assistance to Victims of Domestic Violence (Oct. 19, 2000), available at <http://www.ojp.usdoj.gov/pressreleases/2000/ojp000114.html> (last visited Oct. 13, 2004) (announcing civil legal assistance grants to help battered women address civil legal needs such as obtaining protection orders, divorce, spousal and child support, child custody, and recognizing that “[m]any domestic violence victims, particularly those with low incomes, do not have access to, or cannot afford legal services or representation”) (quoting Bonnie Campbell, Director of the Justice Department's Violence Against Women Office).
- 279 Wiggins, *supra* note 207, at 135-37.
- 280 *Id.* at 141-44.
- 281 See Julie Goldscheid, Advancing Equality in Domestic Violence Law Reform, 11 J. Gender, Soc. Pol'y & L. 417, 422 (2003). While protective orders are most common in cases of domestic violence, they may be used in cases of sexual violence as well. The two categories of crime cannot be so readily distinguished, as over 60% of sexual abuse cases are committed by someone the victim knows. Bureau of Justice Statistics, U.S. Dep't of Justice, Crime Characteristics: Trends in Violent Victimization 1973-2002, at http://www.ojp.usdoj.gov/bjs/cvict_c.htm#relate (last visited Oct. 13, 2004) (reporting that in 2002, more than six in ten rape or sexual assault victims stated the offender was an intimate, relative, friend, or acquaintance); Tjaden & Thoennes, *supra* note 5, at iv (finding that 64% of women who reported being raped, physically assaulted, or stalked since age eighteen were victimized by a current or former intimate partner).
- 282 See, e.g., Joan Zorza, Protecting the Children in Custody Disputes when One Parent Abuses the Other, 29 Clearinghouse Rev. 1113, 1117-21 (1996) (addressing batterers' use of custody battles to perpetuate abuse); Stark, *supra* note 202, at 1018 (highlighting batterers' misuse of custody battles to perpetuate abuse).
- 283 See Goldscheid, *supra* note 281, at 422.
- 284 See Wiggins, *supra* note 207, at 133-51. Jennifer Wiggins has proposed a no-fault insurance fund for domestic violence victims based on the same recognition that domestic violence victims systemically underutilize the tort system. *Id.* at 152-69.
- 285 See, e.g., *Kwaitkowski v. Superior Trading Co.*, 176 Cal. Rptr. 494, 500 (Cal. Ct. App. 1981) (recognizing landlord liability for rape in a building if the landlord failed to exercise reasonable care); *Ortiz v. Housing Auth.*, 22 F. Supp. 2d 15, 20-21 (E.D.N.Y. 1998) (upholding \$3 million damages award against a landlord for negligence leading to a rape at gunpoint); *Jacqueline S. v. City of New York*, 614 N.E.2d 723, 726-28 (N.Y. 1993) (recognizing landlord liability for negligence that may have led to rape in a housing authority building). See generally Leslie Bender, Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third-Party Rapes of Residents, 69 Chi.-Kent L. Rev. 313 (1993) (illustrating male bias in tort law through analysis of a Tennessee Supreme Court decision affirming summary judgment in favor of a property manager whose alleged negligence resulted in the rape of a tenant).
- 286 See, e.g., Legal Momentum, The Impact of Violence in the Lives of Working Women 7-10 (2002), at <http://www.legalmomentum.org/html/pub/pubs/CreatingSolutions.pdf> (last visited Oct. 13, 2004) (citing cases of employer liability).
- 287 See, e.g., Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 Conn. L. Rev. 1247 (2000) (discussing the role of private litigation in shaping public policy regarding the gun industry); Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 Mo. L. Rev. 1 (2000) (same).
- 288 For example, the Attorney General of New York sought to have payments from a settlement with gun manufacturers made to the New York State Crime Victims Board to ensure that the funds would go to victims. Raymond Hernandez, 2 Gun Companies in New York Talks, N.Y. Times, July 21, 1999, at A1.
- 289 Professor Joel Eisen suggests that the universality of September 11 distinguishes it from other contexts in which trauma has been linked with social reform. Joel B. Eisen, The Trajectory of “Normal” After 9/11: Trauma Recovery and Post-Traumatic Societal Adaptation, 14 Fordham Envtl. L.J. 499, 599 (2003). He compared September 11 with other movements in which social change has been associated with trauma, such as the women's movement and the holocaust, and argued that those movements, in contrast to September 11, did not produce widespread advocacy because the trauma victims (e.g., survivors of domestic and sexual violence)

challenged established mainstream beliefs. *Id.* This argument reflects the flip side of the argument presented here that bias against the victim in cases of domestic and sexual violence may account for the relatively minimal benefits awarded to them.

- 290 Fry, *supra* note 62, at 191-92 (drawing an analogy to compulsory no-fault auto insurance and proposing a general tax on every citizen to cover the “risk” of crime to which each was exposed).
- 291 *Id.* at 192-93.
- 292 Goldberg, *supra* note 243, at 2.
- 293 Brickman, *supra* note 129, at 36-38.
- 294 *Id.* at 39-40.
- 295 *Id.*
- 296 *Id.* at 37.
- 297 *Id.* at 38-39.
- 298 See Davis, *supra* note 53, at 499.
- 299 Nat'l Ctr. for Injury Prevention and Control, Dep't of Health and Human Servs., Costs of Intimate Partner Violence Against Women in the United States 19 (2003), at <http://www.cdc.gov/neipe/pub-res/pubs.htm> (last visited Oct. 13, 2004).
- 300 *Id.* Unfortunately, this study did not inquire whether victims were paid for those lost days of work.
- 301 *Id.* at 40 tbl. 12.
- 302 Greenfeld et al., *supra* note 56, at 21.
- 303 See *supra* notes 110-111 and accompanying text.
- 304 The fear of retaliation applies to sexual assault as well as domestic violence since over 70% of sexual assaults are committed by individuals known to the victim. See studies cited *supra* note 281.
- 305 See, e.g., Jody Raphael & Richard M. Tolman, Trapped in Poverty, Trapped by Abuse: New Evidence Documenting the Relationship Between Domestic Violence and Welfare (Apr. 1997), available at http://www.ssw.umich.edu/trapped/pubs_trapped.pdf (last visited Oct. 13, 2004) (documenting the relationship between violence and poverty); Laura Dugan, Daniel Nagin & Richard Rosenfeld, Do Domestic Violence Services Save Lives?, 250 Nat'l Inst. of Justice 20, 22 (2003), available at <http://www.ncjrs.org/pdffiles1/jr000250f.pdf> (last visited Oct. 13, 2004) (reporting that reductions in Aid to Families with Dependent Children (AFDC) benefits have been associated with an increase in intimate partner violence, while an increase in benefits may reduce the risk).
- 306 Louise Laurence & Roberta Spalter-Roth, Inst. for Women's Pol'y Research, Measuring the Costs of Domestic Violence Against Women and the Cost-Effectiveness of Interventions: An Initial Assessment and Proposals for Further Research 25 (1996) (reporting studies).
- 307 Thomas Moore & Vicky Selkove, Inst. for Wisconsin's Future, Domestic Violence Victims in Transition from Welfare to Work: Barriers to Self-Sufficiency and the W-2 Response 1 (Sept. 1999), at <http://www.wisconsinsfuture.org/publications/workingfamilies/DomesticViolenceSummary.pdf> (last visited Oct. 13, 2004) (finding approximately 30%); U.S. Gen. Accounting Office, Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients 19 (Nov. 1998), at <http://frwebgate.access.gpo.gov> (citing several studies) (last visited Oct. 13, 2004).
- 308 Dugan, Nagin & Rosenfeld, *supra* note 305, at 22.
- 309 S. Rep. No. 103-138, at 54 (1993) (citing Elizabeth Ellis, Beverly Atkeson & Karen Calhoun, An Assessment of the Long Term Reaction to Rape, 90 J. Abnormal Psych. 263, 264 (1981)).
- 310 Safe Horizon, Rape and Sexual Assault: Effects of Incident on Employment and School (July 2004) (on file with author).

- 311 See Michael Katz, *The Undeserving Poor* 13-17 (1989); Joel F. Handler, "Constructing the Political Spectacle:" *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 *Brook. L. Rev.* 899, 944 (1990); Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 *Emory L.J.* 1, 2 (2003); see also, e.g., Michael Harrington, *The Other America: Poverty in the United States* 139-57 (1963) (describing societal neglect of the poor and the failure of antipoverty programs to help the invisible poor); Frances Fox Piven & Richard A. Cloward, *Regulating the Poor: The Functions of Public Welfare* 183-247 (1971) (describing the myriad ways in which social welfare programs control the poor).
- 312 See *supra* notes 84-117 and accompanying text.
- 313 Henry Weihofen, *Compensation for Victims of Criminal Violence: A Roundtable*, 8 *J. Pub. L.* 209, 210-11 (1959).
- 314 *Id.* at 210.
- 315 *Id.*
- 316 *Id.* at 211.
- 317 *Id.* at 212.
- 318 See, e.g., Childres, *supra* note 133, at 273 (cautioning that "women yearning for rape" might seek compensation) (emphasis added).
- 319 *S. Rep. No. 93-83*, at 6 (1973).
- 320 *S. Rep. No. 103-138*, at 49 & n.52 (1993) (listing studies); see also Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 *S. Cal. Rev. L. & Women's Stud.* 1, 55-58 (1996) (describing uniform task force conclusions that "all reaches of the justice system" trivialize domestic violence, including police reluctance to enforce protective orders, misperceptions of extent of violence, judicial presumptions that the victim provoked or deserved the violence, and the perception that only visible injuries are real).
- 321 Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, *Final Report* 390, available at <http://www.courts.state.pa.us/index/supreme/biascmte/finalreport.pdf> (last visited Oct. 13, 2004).
- 322 *Id.* at 396 (detailing ways in which court personnel misinterpret survivors' reactions to the abuse or failure to leave). In another recent example, a New York State village judge resigned after he was accused of telling a victim of domestic violence that such cases are "dragged out" and a "waste of the court's time," and telling a state trooper that most women enjoy being abused and ask to get "smacked around." Editorial, *Domestic Violence Still Not Understood*, *Observer-Dispatch* (Utica, N.Y.), Jan. 12, 2004, at 7A.
- 323 Sir Matthew Hale, *The History of the Pleas of the Crown* 634 (1847).
- 324 See, e.g., Jeffrey Toobin, *The Consent Defense*, *The New Yorker*, Sept. 1, 2003, at 40 (documenting the history of rape reform in the context of efforts by NBA star Kobe Bryant to discredit testimony of the witness who brought a complaint of sexual assault against him).
- 325 Much rape law reform has focused on initiatives such as regrading offenses, eliminating resistance requirements, eliminating corroboration requirement, and the enactment of rape shield laws. See, e.g., Ronet Bachman & Raymond Pasternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 *J. Crim. L. & Criminology* 554, 558-60 (1993); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 *Colum. L. Rev.* 1, 69-72 (1977) (tracing treatment of rape victims in criminal prosecutions and proposing rape shield statutes to reduce the problematic use of victims' sexual history in those trials); Susan Estrich, *Rape*, 95 *Yale L.J.* 1087, 1092 (1986) (exposing the myth that only rapes by strangers were "real" rapes). Studies of the effectiveness of these reforms have concluded that they have modestly increased victim reporting rates and offender incarceration, but that barriers in the criminal justice system remain. See Bachman & Pasternoster, *supra*, at 573-74; see also, e.g., Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 *U. Chi. L. Rev.* 1095, 1096-1100 (1987) (recounting limitations of legal reform and victims' enduring difficulties obtaining redress); Cassia C. Spohn & Julie Horney, *The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases*, 86 *J. Crim. L. & Criminology* 861, 862-63 (1996) (tracing rape law reforms and evaluating their impact on rates of arrest, prosecution, conviction, and incarceration). Scholars have begun to identify unintended effects of reforms that impede successful prosecution. See, e.g., Michele J. Anderson, *Reviving Resistance in Rape Law*, 1998 *U. Ill. L. Rev.* 953, 1005-09 (1998) (arguing that elimination of the resistance requirement hampers prosecutions in cases in which women

did not consent and were overcome by force). Moreover, rapes and other sex crimes continue to be downgraded and ignored by law enforcement personnel. See, e.g., Mark Fazlollah, Nat'l Org. for Women, Women Activists Monitor Philadelphia Rape Squad, Women's eNews, at <http://www.now.org/eNews/feb2001/022001/philadelphiarape.html> (Feb. 20, 2001) (last visited Oct. 13, 2004) (recounting exposure of Philadelphia police department's misclassification and failure to investigate sexual assault complaints).

- 326 See, e.g., Karp & Karp, *supra* note 277, §§1.16-1.20 (citing tort immunity doctrines and current case law); Dalton, *supra* note 277, at 324-30; Wriggins, *supra* note 207, at 129-33. Doctrines such as marital immunities continue to prevent married victims of sexual assault from obtaining redress through the criminal justice system. See Michelle J. Anderson, [Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates](#), 54 *Hastings L.J.* 1465, 1516-54 (2003) (tracing the history and status of marital immunities for sexual assault and proposing new law to eliminate them).
- 327 For example, Congress amassed a detailed record of the policies and practices that operated to preclude victims of crimes such as domestic violence and sexual assault from bringing suit when it enacted the 1994 Violence Against Women Act. See Amicus Brief of Senator Joseph Biden for Appellant, at 1-4, [United States v. Morrison](#), 529 U.S. 598 (2000) (Nos. 99-5, 99-29) (recounting legislative record of laws, policies and practices that create barriers for women seeking redress for domestic and sexual violence). Congress identified practices that cast doubt on the credibility of those filing claims for domestic and sexual violence as one persistent barrier to justice. *Id.*; see also Swent, *supra* note 320, at 55-70 (detailing further enduring practices that preclude redress for victims of domestic and sexual violence).
- 328 See *supra* notes 3-7 and accompanying text.
- 329 See *supra* note 180 and accompanying text.
- 330 ATSSSA, Pub. L. No. 107-42, §404(c)(2)(A), 115 Stat. 230 (2001) (codified at 49 U.S.C.A. §40101 note (West Supp. 2004)); September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233, 11,242 (Mar. 13, 2002) (codified at 28 C.F.R. §104 (2003)).
- 331 See, e.g., The Public Nature of Private Violence (Martha A. Fineman & Roxanne Mykituk eds., 1995); Elizabeth M. Schneider, The Violence of Privacy, 23 *Conn. L. Rev.* 973 (1991); Goldfarb, *supra* note 211, at 1-87.

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